LEGISLATION TO DENY TAX EXEMPTION TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

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PROPOSED LEGISLATION TO DENY TAX EXEMPTION TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

MONDAY, FEBRUARY 1, 1982

U.S. SENATE,
SENATE FINANCE COMMITTEE,
Washington, D.C.

The committee met, pursuant to notice, at 10:42 a.m., in room 2221, Dirksen Senate Office Building, Hon. Robert J. Dole (chairman) presiding.

Present: Senators Dole, Packwood, Danforth, Heinz, Wallop, Symms, Grassley, Byrd, Matsunaga, Moynihan, Boren, and Representative Charles B. Rangel.

[The press release announcing hearings, the prepared statements of Senators Dole, Symms, Grassley, and Hart, and background material prepared by the Joint Committee on Taxation follow:]

[Press Release No. 82-104, January 18, 1982, Committee on Finance, U.S. Senate]

SENATE FINANCE COMMITTEE SCHEDULES HEARING ON PROPOSED LEGISLATION TO DENY TAX-EXEMPTION TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

The Honorable Robert J. Dole, Chairman of the Committee on Finance, announced today that the Committee has scheduled a hearing on legislation that would deny the benefits of tax-exempt status to private schools maintaining racially discriminatory policies.

Chairman Dole stated, "The President has specifically asked that Congress act to assure that private schools that discriminate on the basis of race will not be exempted from income tax. I have assured the President that the Finance Committee will act expeditiously to consider the Administration's proposals in the area."

Dole added, "Today the President sent proposed legislation to the Vice President in his capacity as President of the Senate. I intend to introduce this legislation when the Senate returns next week.

"In his cover letter transmitting the proposed legislation, the President reiterated his desire for early Congressional action in the following way: 'I pledge my fullest cooperation in working with you to enact such legislation as rapidly as possible, and urge that you give this matter the very highest priority.'"

The hearing is scheduled for Monday, February 1 at 10:30 a.m. in Room 2221, Dirksen Senate Office Building.

STATEMENT OF CHAIRMAN DOLE

Today we open the first round of hearings on legislation to deny Federal tax-exempt status to private schools that discriminate on the basis of race. We will hear today only from Administration witnesses; however, we expect to set soon a hearing date to receive testimony from the many public witnesses concerned about this matter.

Racial discrimination in any form is abhorrent. Nevertheless, such discrimination is particularly repugnant where it restricts the availability of educational opportunity, which is one of the basic underpinnings of American democracy. Because I be-

lieve that racial prejudice is fundamentally wrong and a socially destructive force, I think it should be made clear that private schools which discriminte on the basis of race should not be eligible for the benefits of an exemption from Federal taxation. Otherwise, the Federal Government can be viewed as tacitly encouraging racial discrimination in education by conferring the advantages of tax-exempt status on discriminatory institutions.

Desipite my conviction that discriminatory schools should be denied tax-exempt status, we must be careful that our zeal to eradicate racial discrimination does not result in any infringement of religious freedom, an equally strong tenet of American democracy. The majority of private schools in this country have a religious affiliation. Many of these schools sincerely believe that past Internal Revenue Service nondiscrimination policies and enforcement efforts have run roughshod over constitutionally guaranteed religious liberties.

Thus, if we are to legislate on this issue, Congress needs all the guidance it can get concerning how to resolve the conflict between nondiscrimination objectives and first amendment religious liberties. I am one who hopes that it is still possible for the Supreme Court to decide the *Bob Jones* and *Goldsboro Christian Schools* cases so that Congress can benefit from the Court's wisdom on these difficult constitutional issues.

I look forward to the light that the witnesses today can shed on this very complex issue.

STATEMENT OF HON. STEVEN D. SYMMS

Good morning. Today, the Senate Finance Committee is faced with a difficult decision. It must amend the IRS Code to make clear what private actions violate Federal Civil rights policies to such an extent that the government must deny a tax exemption. At the same time, it must scrupulously avoid comprising what is perhaps the most cherished of all of our freedoms, the right to practice one's religious beliefs without subjecting oneself to government scrutiny. It must avoid at all costs setting up a mechamism, that in the future, could be used to compel educational institutions in this country to choose between revising their teaching to accord to the current Federal orthodoxy or ground out of business.

The issue before the Senate Finance Committee is whether or not the exercise of a sincerely held religious belief, by a pervasively religious private institution which is not the recipient of direct or indirect financial assistance from government shall result either in the denial of its tax-exempt status, with the necessarily severe, and possibly fatal, economic harm which must result therefrom, or the compelled abandonment of an article of faith.

In examining the issue of tax exemptions, the Senate Finance Committee must decide whether it will adhere to the fairly new philosophy underlying the theory of "tax expenditures." The theory of "tax expenditures" was, I believe, founded by Stanley Surrey and implemented during his tenure at the Department of the Treasury during the Kennedy Administration. The "tax expenditure" theory assumes that all income and possessions belong to the State and that it is an expense to the Government if some portion of that individual's possessions are returned to the individual. Until the 1960's, the United States Government's tax policy was based on the premise that each individual was obligated to pay a portion of his income to the Government for services that the Government provided to those living in and being protected by the Government of the United States.

If we make the assumption that all possessions and income belong to the State, then a tax exemption could be considered a subsidy. If we believe that income and possessions belong to the individual but that the individual must pay a fee for living in and being protected by the Government, then a tax exemption cannot be considered a subsidy.

I would like to state at this time that I am and have been a strong opponent of discriminatory policies and of those who practice discrimination of any sort. Personally, religions that discriminate are abhorrent to my own sense of ethics. Furthermore, religions founded for the sole purpose of establishing educational institutions that will allow them to discriminate are, in my opinion, religions that are not bona-fide religious institutions. However, whether a particular religious institution is bona-fide should be an issue that is settled by the IRS proving, in our courts, that a particular religion is not a bona-fide religious institution.

Nevertheless, I am hopeful that the Committee and the Congress will make an equitable and Constitutional decision on this issue if forced to legislate on this matter.

I am in agreement with Senator Moynihan that the Congress should not legislate on every issue that involves the Constitution and the Civil Rights Act. The function of our court system is to interpret, reaffirm and insure the implementation of the law. Undoubtedly, whatever decision the Congress reaches, it is very likely that the issue will again be considered by the courts, where a final decision on the issue will most likely be made.

BACKGROUND

The Internal Revenue Code provides for tax exemptions for certain organizations among whom it lists organizations that are "religious, charitable, (or) scientific" (26 U.S.C. Section 501(c)(3)). Twelve years ago, the IRS, with no other Congressional authorization other than the language just cited, decided that no exemptions could be granted, as a matter of public policy, to institutions that were racially biased. To carry out its new policy it promulgated a set of regulations that have caused a great deal of furor because of their intrusiveness and overbreadth.

The proposed regulations included a presumption of guilt against private schools that were expended during the controversy over desegregation and busing. A school so expanded, even though it had never refused an application by a minority student, would not only have to prove its absence of discriminatory intent, but also would have to advertise for minority students and faculty members and meet hiring and enrollment guidelines dictated by the IRS.

Congress sought to intervene and prevent implementation of these intrusive policies through annual re-passage of the Ashbrook-Dornan amendments. By deliberately losing a case brought against it by civil rights activists, however, the IRS succeeded in having a federal court mandate the IRS's proposed regulations in spite of contrary legislation. Until last Friday the whole matter was to have been taken up by the United States Supreme Court in the case of *Bob Jones University* v. *United States*.

On January 12, officials of the Treasury and Justice Department issued a press release that was, in effect, an admission that the IRS had trespassed into Congress' territory when it attempted to define legitimate tax-exempt charitable activity. They conceded that the Code did not explicitly authorize denial of tax exemptions for racial discrimination "except in the case of social clubs." The Treasury summarized its position as follows:

"The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970. Thus the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy."

PUBLIC OPPOSITION TO IRS REGULATIONS

For over ten years these regulations had been vigorously opposed not because of racial concerns, but rather because of the intrusiveness and overbreadth. When, in 1978, the IRS scheduled hearings on proposed regulations in this area, the agency was deluged with more mail than it had ever received on any other issue. Several thousand people from these groups came to Washington and some 400 testified at the public hearings on the matter, again a record turnout. So concerned were Orthodox Jews about this unprecedented assertion of government power that they testified against the proposed revenue procedure at the IRS hearings and later filed an amicus brief in the *Bob Jones University* case before the U.S. Supreme Court.

Objection to these regulations from so large and diverse a group of people came because they created a presumption of guilt against all private schools, a presumption that required any school, no matter how innocent, not only to open all its books and records to IRS agents, but also to take affirmative steps to show that it was advertising for and actively seeking to recruit black students and faculty. The IRS had justified this broad assertion of its power not on the standards set forth in the Internal Revenue Code itself but on the grounds of a public policy against racial discrimination that rose to the status of a sort of Federal common law.

Some saw in this application of "public policy" by a Federal agency an alarming assertion of the right of the government to examine religious organizations for lack of orthodoxy and to categorize such organizations as unacceptable. With its power to grant or deny tax exemptions based on aspects of an organization's doctrine, the government was asserting a revolutionary new right to exert pressure on religious bodies by the power to analyze them periodically in the light of continuously evolving standards of public policy and to reassess the legitimacy of their beliefs. These churches and religious bodies ascertained that it would be only a matter of time

before the right to examine religious institutions on grounds of public policy extended to the right to deny exemptions to institutions that refused to ordain women or that refused to admit practicing homosexuals and other groups now clamoring for recognition.

FIRST AMENDMENT RIGHTS IN JEOPARDY

An apt summary of the law in this area may be found in Justice Douglas' majority opinion in *United States* v. *Ballard*, 322 U.S. 882-887, which held unconstitutional attempts of government to determine which religious beliefs are legitimate. The First Amendment places all religions in the same position.

"Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in the same position."

The legislation proposed by the Administration may well compromise this historical principle in an attempt to solve the difficult problem of discrimination. A popular but inaccurate argument that many are advancing with respect to the IRS regulation is that since tax-exemptions are a government benefit or "subsidy" the government can attach any strings it sees fit. The Supreme Court has already issued a reply to this kind of argument. In *Thomas* v. *Board*, Review 49 U.S.L.W. 4341, 4344 (1981), the Supreme Court held that:

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

If any restrictions are placed on granting exemptions to private schools they should be much more narrow than the ones the IRS attempted to establish, particularly with regard to church institutions which are protected by the first amendment. If pluralism is to continue to survive, religious organizations with unpopular lifestyles and views must continue to be allowed to exist without unnecessary harassment.

THE ADMINISTRATION'S PROPOSED STATUTE

Early this week the Administration came out with a proposed statute that not only codifies the regulatory program the churches found so objectionable but further expands the sphere of federal control.

Under the Administration's bill an organization will not be tax-exempt if it has a racially discriminatory policy. An organization has a "racially discriminatory" policy if it refuses to admit students of all races to all programs offered by the organization, or if the organization refuses to administer its program in a manner that does not discriminate on the basis of race.

Policies are not discriminatory if limited to members of a particular organization or belief, provided such policies are not based upon race or upon belief that requires discrimination on the basis of race.

Section 2 would deny gift tax deductions for gifts to an offending organization and would also deny estate tax deduction for estate gifts to offending organizations.

Following are some of the serious objections to the Administration's proposed statute:

(1) Section 4 makes the bill retroactive to July 9, 1970. Under this onerous provision churches would suddenly find themselves liable for thousands of dollars in back taxes. The bill would thus condone twelve years of illegal law-making by IRS bureaucrats.

(2) The statute is ambiguous as to what test should be used to prove discrimination. Under one popular test, the so-called "effects" test the government need only show that the effects of discrimination are present in order to bear its burden of proof; for example, it need only show that no minority students or faculty attend the organization in order to establish a prima-facie case of discrimination. Under the "intent" test, however, the government must establish that an organization intended to discriminate on the grounds of race.

An acceptable statute should clearly define discrimination as a specific instance of a refusal to grant admission to a member of a racial minority who is otherwise qualified for admission. This kind of statute would preclude the government from removing an exemption merely because an organization was not able to show the desired percentage of minority students. In other words, such an acceptable statute must be one which clearly places upon the government the initial burden of showing that an organization is guilty of misconduct.

(3) Under the proposed statute with its use of the broad term "organization" an entire church and not just a church school could lose its exemption since the statute denies exemptions to organizations that are discriminatory and that "maintain" schools. In fact, so poorly worded is the statute that it could be read so that a church could lose its exemption, even if its school were not discriminatory, so long as the government could show that the church itself was discriminatory. The proposed IRS regulations that provoked such a storm of controversy ventured only to regulate church schools. The Administration's proposal would regulate churches directly, whatever the nature of the schools they run.

(4) The whole statute is palpably unconstitutional in that it promotes excessive entanglement of the government with religion. This kind of entanglement would have a chilling effect on the First Amendment right to the free exercise of religion. It would also have the effect of establishing, as governmentally approved, those institutions that follow the orthodox government line on public policy. While this statute is restricted to race, it would establish a clear precedent for other regulatory measures on matters of church belief and practice.

(5) As a general principal of government, the taxing power should not be manipulated to support social policies of any kind, as distinguished from economic policies. As John Marshall declared in the case of *McCulloch* v. *Maryland*, "The power to tax is the power to destroy." The kind of Congressional enactment that the Administration proposes, a tax law that imposes an affirmative action program on private schools, is the kind of program that the government could use to pursue any of the social objectives now reserved to the people or to the states.

Opening Statement of Senator Charles Grassley

I would like to commend Chairman Dole on his swift scheduling of hearings on this controversial issue. To have delayed would have created even greater confusion than currently exists. I think all of us would agree that past misunderstandings have created a very unfortunate situation which needs to be cleared up. However, in a hurry to legislate we should not lose sight of gigantic constitutional issues we are dealing with and should thus take the necessary time to carry out our duty in a responsible way.

The comments of the Administration witnesses will be most helpful in this regard. I hope these representatives will dispell all of the confusion today and provide us with their best assessment of what future action Congress needs to take. Both the Congress and the public need a clarification of the Administration's position.

501 (C)(3) status for private schools with racially discriminatory policies is an emotional issue for good reason. The resolution of this issue requires us to draw a delicate line between two cherished Constitutional freedoms. One, the right of each citizen to equal opportunity and protection under our nation's laws. The guarantee of equal protection coupled with the Thirteenth Amendment compounds our concern about any federal policy which involves racial discrimination. The well-established right to be free of invidious distinctions based solely on race is buttressed by Title VI of the Civil Rights Act of 1964 prohibiting racial discrimination in federally assisted programs. The other Constitutional prohibition involved in this conflict is contained within the opening words of the first amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The motivation for many of our Nation's founders in crossing the Atlantic was to escape religious tyranny. Freedom to chose and practice one's religion without state interference is a central theme of American democracy.

In my view, one of the times these Constitutional freedoms have the potential to conflict is when the government needs to determine whether or not a private school is discriminating on the basis of race. It seems clear to me that the Constitution requires that a private, secular school can not receive tax exemption if it discriminates on the basis of race. There is no justification for granting tax exempt status to secular private schools which engage in racial discrimination. The struggles of Black Americans to gain equal access to educational institutions began with *Brown* v. *Board of Education* in 1953. I have no interest in hindering the advances Blacks

have made in this critical area by reverting to a system of segregated schools financed with the help of federal tax exemption.

If legislation is necessary to resolve this conflict, my primary concern is drafting legislation which tells the government how it can constitutionally determine whether or not a private religious school is racially discriminatory. I think it is important that a policy is developed which allows the IRS to make a determination about racial discrimination without becoming embroiled in the issue of examining whether or not an underlying religious belief is racially discriminatory. It is my preference that a policy is developed which looks at whether the school denies minority applicants equal educational opportunities, without ever examining the basic tenets of the religion.

Once again, I must commend Chairman Dole for holding a series of hearing on this issue to provide all interested parties with a full and fair opportunity to be heard. This legislation touches important Constitutional freedoms valued by all Americans, and the comments of these witnesses should help us devise a sensible solution to this difficult problem.

Statement by Senator Gary Hart

Mr. Chairman, I appreciate the opportunity to make a brief statement to the committee as you begin your hearings on the issue of tax-exempt status for private schools that practice racial discrimination. I commend Chairman Dole for bringing the committee to act quickly on this issue and for working in good faith to help resolve the controversy over the Federal Government's position on this issue.

Mr. Chairman, I believe the Administration's confusing policy reversals on this issue of the last few weeks have been unfortunate and unnecessary. They represent an insensitivity not only to the law and the progress made on civil rights in the last quarter century but more important, an insensitivity to the fundamental moral values which have been the foundation for such progress. The new statute which President Reagan has now proposed and which is now pending before this committee only adds further to the unnecessary confusion.

Current Federal law is clear. As the U.S. Commission on Civil Rights has pointed out, the Constitution, title IV of the 1964 Civil Rights Act, and the Internal Revenue Code authorize, indeed require the IRS to deny tax-exempt status to private schools which discriminate on the basis of race. The courts have already interpreted Federal law in this manner.

For this reason, I have submitted, with Senator Durenberger and Senator Moynihan and 26 other cosponsors a resolution which will put the Congress firmly on record against tax-exempt status for private schools that practice racial discrimination. The concurrent resolution states the sense of the Congress that current Federal law clearly authorizes and requires the Internal Revenue Service to deny tax-exempt status and deductibility of contributions to private schools that discriminate on the basis of race.

Mr. Chairman, I urge the committee to seriously consider this resolution as an alternative to the legislation pending before you. The point which this resolution makes about the adequacy of current Federal law reflects the view of the U.S. Commission on Civil Rights and a number of civil rights organizations. By adopting this resolution Congress would make a strong statement that current Federal law is, and has been clear on mandating that tax-exempt status be denied to private schools that discriminate on the basis of race.

Again, I appreciate the Chairman providing me this opportunity to make this statement.

Text of Senate Concurrent Resolution 59

Resolved by the Senate (the House of Representatives concurring),

Whereas, the Congress provided the legislative basis for denying tax exemption to private schools that discriminate because of race when it passed the Civil Rights Act of 1964.

Whereas, in 1971, the U.S. District Court of the District of Columbia stated in *Green* v. *Connally* that: "The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operated on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors," and the Supreme Court of the United States has affirmed that decision.

Whereas, it has been the policy of the Internal Revenue Service since 1970 to deny the benefits of tax-exempt status and deductibility of contributions to racially discriminatory private schools.

Therefore be it resolved, it is the sense of the Congress that current Federal law clearly authorizes and requires the Internal Revenue Service to deny tax exempt status and deductibility of contributions to private schools that practice racial discrimination.

BACKGROUND

RELATING TO

THE EFFECT OF RACIALLY DISCRIMINATORY POLICIES ON THE TAX-EXEMPT STATUS OF PRIVATE SCHOOLS

PREPARED FOR THE

COMMITTEE ON WAYS AND MEANS

AND THE

COMMITTEE ON FINANCE

BY THE STAFF

OF THE

JOINT COMMITTEE ON TAXATION

INTRODUCTION

The Senate Committee on Finance and the House Committee on Ways and Means have scheduled public hearings on the Federal Government's policy regarding the effect of racial discrimination on the tax-exempt status of private schools. The Finance Committee hearing is scheduled for February 1, 1982, and the Ways and Means Committee hearing is scheduled to begin on February 4, 1982. This pamphlet has been prepared by the staff of the Joint Committee on Taxation in connection with these hearings.

The first part of the pamphlet is an overview of the matters described in more detail in later parts. The second part describes recent developments relating to the Administration's position on the effect of racially discriminatory policies on tax-exempt status for private schools. The third part briefly describes Internal Revenue Code provisions relating to tax-exempt status for schools and deductibility of contributions to schools. The fourth part describes, in chronological order, developments regarding the effect of racially discriminatory policies on tax-exempt status for private schools, including court decisions and Internal Revenue Service rulings and procedures. The fifth part describes court decisions as to the tax-exempt status of Bob Jones University and Goldsboro Christian Schools, Inc. Finally, the sixth part of the pamphlet describes the Administration's legislative proposal relating to denial of tax-exempt status to private schools which have policies of racial discrimination.

I. OVERVIEW

This overview summarizes various judicial, administrative, and legislative actions involving the tax-exempt status of certain organizations and the question of racial discrimination.

The Internal Revenue Code provides tax-exempt status under section 501(c)(3) for organizations which are "organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." Generally, organizations exempt under section 501(c)(3) are entitled to receive contributions which are deductible by the donor under section 170.

In 1954, the U.S. Supreme Court, in *Brown* v. *Board of Education*,[1] held that racial discrimination in public education was unconstitutional. Prior to 1970, the IRS policy on tax exemptions for private schools was that tax-exempt status was available to racially discriminatory private schools so long as those schools were not receiving aid from a State or political subdivision of a State so as to make operation of the school unconstitutional or in violation of Federal law.

On July 10, 1970, during the litigation of *Green* v. *Connally*,[2] the IRS announced that private schools which practice racial discrimination would not be recognized as tax exempt under section 501(c)(3) or as eligible for tax-deductible contributions under section 170.[3] The U.S. District Court for the District of Columbia held, in *Green*, that racially discriminatory private schools are not entitled to the Federal tax exemption provided for educational organizations and that gifts to such schools are not deductible as charitable contributions by the donors.

The District Court, in *Green*, placed the IRS under a permanent injunction to deny tax exemptions to private schools in Mississippi that practice racial discrimination as to students. The Court also ordered the IRS to implement its decision by requiring such schools to adopt and publish a nondiscriminatory policy and provide the IRS with information to enable the IRS to determine if the schools discriminate on the basis of race. The U.S. Supreme Court affirmed, per curiam (without opinion), the District Court's decision in Green.[4]

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[1] 347 U.S. 483 (1954).

[2] 330 F. Supp. 1150 (D.D.C.) aff'd per curiam sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971) (hereinafter *Green*).

[3] See IRS News Release, July 10, 1970. At the time of the IRS News Release, the IRS was under a U.S. District Court preliminary injunction not to approve any application for tax-exempt status by any private school in Mississippi or determine that any contribution to such school was deductible unless the IRS affirmatively determined that the school was not part of a system of racially segregated private schools operated as an alternative for white students seeking to avoid desegregated public schools. See *Green* v. *Kennedy*, 309 F. Supp. 1127, 1150 (D.D.C. 1970), appeal dismissed sub nom. *Cannon* v. *Green*, 398 U.S. 956 (1970).

[4] *Coit* v. *Green*, 404 U.S. 997 (1971).

After the *Green* case, the IRS issued a revenue ruling and a revenue procedure,[5] in 1971 and 1972, which stated that private schools with racially discriminatory policies as to students would not be recognized as organizations exempt from Federal income tax. These documents also set forth guidelines for determining whether certain private schools have adequately publicized their racially nondiscriminatory policies so as to enable them to qualify for tax-exempt status.

In 1975, the IRS published Revenue Procedure 75–50,[6] which set forth guidelines and recordkeeping requirements for determining whether private schools have racially nondiscriminatory policies. A school's failure to comply with these guidelines ordinarily would result in the proposed revocation of the tax-exempt status of the school. In Revenue Ruling 75–231,[7] the IRS stated that private schools operated by churches, like other private schools, could not retain their tax-exempt status if they were racially discriminatory as to students.

In 1976, the plaintiffs in the *Green* case sought further injunctive relief from the U.S. District Court, asserting that the IRS was not complying with the Court's continuing injunction that Mississippi private schools that are racially discriminatory be denied tax-exempt status. The Court then modified and supplemented the permanent injunction relating to the tax-exempt status of Mississippi private schools that racially discriminate.[8] In a companion suit to *Green*,[9] parents of black children attending public schools in several States sought declaratory and injunctive relief to require the IRS to deny applications for tax-exempt status, on a nationwide basis, to schools that racially discriminate. The District Court dismissed this suit on the ground that the parents lacked "standing" to bring the suit. The U.S. Court of Appeals for the D.C. Circuit, in a 2–1 decision, reversed the District Court and held that the suit could be maintained. The Government has filed a petition for a writ of certiorari seeking U.S. Supreme Court review of the standing issue in this case.

In response to the reopening of the *Green* case and the *Wright* litigation, the IRS, on August 22, 1978, published a proposed revenue procedure intended to provide more effective guidelines for identifying private schools that racially discriminate as to students.[10] After substantial revision, the IRS published another proposed revenue procedure in 1979.[11]

Through provisions enacted as part of appropriations legislation, Congress has forbidden the IRS to develop or carry out any rulings, procedures, or other positions concerning tax exemption for racially discriminatory private schools beyond those that were in effect prior to August 22, 1978 (the publication date for the initial version of the revenue procedure). Accordingly, neither the 1978 proposed revenue

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[5] See Rev. Rul. 71–447, 1971–2 C.B. 230 and Rev. Proc. 72–54, 1972–2 C.B. 834.
[6] 1975–2 C.B. 587.
[7] 1975–1 C.B. 158.
[8] See *Green* v. *Miller*, 45 AFTR 2d 80–1566 (D.D.C. 1980).
[9] *Wright* v. *Miller*, 490 F. Supp. 790 (D.D.C. 1979), rev'd sub nom. *Wright* v. *Regan*, 656 F. 2d 820 (D.C. Cir. 1981).
[10] I.R. News Release 2027. This proposed revenue procedure was published in the Federal Register on August 22, 1978.
[11] I.R. News Release 2091. This revised proposed revenue procedure was published in the Federal Register on February 13, 1980.

procedure nor the 1979 revised proposed revenue procedure has been implemented.

In *Prince Edward School Foundation* v. *United States*,[12] the U.S. District Court for the District of Columbia, following its decision in *Green*, held that a nonprofit private school in Virginia was not entitled to tax exemption under section 501(c)(3) because of its racially discriminatory admissions policy.

In *Bob Jones University* v. *United States*,[13] the U.S. Court of Appeals for the Fourth Circuit, (in a 2–1 decision), reversing the U.S. District Court decision in the case, held that the IRS revocation of the University's tax-exempt status because of its racially discriminatory policies violates neither the statutory mandate of section 501(c)(3) nor the First Amendment to the Constitution. In *Goldsboro Christian Schools, Inc.* v. *United States*,[14] the Fourth Circuit affirmed, in an unpublished opinion, the District Court's holding that private schools maintaining racially discriminatory admissions policies violate clearly declared public policies of the United States and, therefore, must be denied tax-exempt status under section 501(c)(3). The Fourth Circuit affirmed (in a 2–1 decision) on the basis of its opinion in *Bob Jones University*. On October 13, 1981, the U.S. Supreme Court agreed to review both of these cases.

On January 8, 1982, the Justice Department, in connection with the Treasury Department's announcement on the same day, requested the Supreme Court to vacate, as moot, the judgments of the Fourth Circuit in the Bob Jones University and Goldsboro Christian Schools, Inc. cases. The Government's Memorandum stated that the Treasury Department has initiated the steps necessary to provide Bob Jones University and Goldsboro Christian Schools, Inc. with tax-exempt status and to refund to them the Federal social security and unemployment taxes in dispute. The Memorandum also stated that the Treasury Department has commenced the process necessary to revoke certain IRS rulings related to denial of tax-exempt status to private schools that racially discriminate.

The Administration has submitted to Congress legislation to prohibit tax-exempt status for private, nonprofit educational organizations that have racially discriminatory policies.

[12] 478 F. Supp. 107 (D.D.C. 1979) aff'd by unpublished order No. 79–1622 (D.C. Cir. June 30, 1980), cert. denied. 450 U.S. 944 (1981).

[13] 468 F. Supp. 890 (D.S.C. 1978), rev'd 639 F. 2d 147 (4th Cir. 1980), cert. granted —— U.S. —— (October 13, 1981).

[14] 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd in an unpublished opinion (4th Cir. February 24, 1981), cert. granted —— U.S. —— (October 13 ,1981).

II. RECENT DEVELOPMENTS RELATING TO THE ADMINISTRATION'S POSITION ON THE TAX-EXEMPT STATUS OF CERTAIN PRIVATE SCHOOLS

Treasury announcement

On January 8, 1982, the Treasury Department announced that "without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational, or scientific organizations on the grounds that they don't conform with certain fundamental public policies." In particular, the announcement pointed out that under prior Treasury policy, the Internal Revenue Service had revoked the tax exemption of organizations which "did not adhere to certain fundamental national policies, such as those forbidding discrimination on the basis of race * * *." The announcement stated that the Treasury's change in position "reflects the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions" of certain private schools "is not supported by the language of the Internal Revenue Code or its legislative history."

Government position in Supreme Court cases

Also on January 8, 1982, the Justice Department requested the U.S. Supreme Court to vacate, as moot in light of the new Treasury policy announced that day, two decisions of the U.S. Court of Appeals for the Fourth Circuit which had upheld IRS actions regarding tax-exempt status for Bob Jones University and for Goldsboro Christian Schools, Inc. The Supreme Court had agreed on October 13, 1981, to review these two cases.

The IRS had revoked its determination letter which previously recognized tax-exempt status (and eligibility to receive tax-deductible contributions) for Bob Jones University, on the ground that certain racial policies of the University precluded favorable tax treatment under section 501(c)(3) of the Internal Revenue Code. The University had challenged that IRS position through litigation in the U.S. District Court for South Carolina, which held that the University did qualify for tax exemption. On appeal, this decision was reversed by the Fourth Circuit, which sustained IRS authority to revoke the University's tax-exempt status in light of its racial policies.

Likewise, the IRS had determined that Goldsboro Christian Schools, Inc. did not qualify for tax-exempt status (or eligibility to receive tax-deductible contributions) on the ground that the organization maintained a racially discriminatory admissions policy. In litigation brought by that organization to challenge the IRS action, the U.S. District Court for the Eastern District of North Carolina upheld the denial of favorable tax treatment, and the Fourth Circuit affirmed that decision on appeal.

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The Justice Department's Memorandum to the Supreme Court (asking that the judgments of the Fourth Circuit be vacated as moot) stated that "the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute." The Memorandum also stated that "the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute." The Memorandum further stated that "the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code." [1]

Administration's proposed legislation

On January 12, 1982, the White House issued a statement concerning the tax-exempt status of nonprofit, private, educational institutions. In that statement, President Reagan said that "I am unalterably opposed to racial discrimination in any form" and that "I am also opposed to administrative agencies exercising powers that the Constitution assigns to the Congress." The President further stated that "I believe the right thing to do on this issue is to enact legislation which will prohibit tax exemptions for organizations that discriminate on the basis of race. Therefore, I will submit legislation and will work with the Congress to accomplish this purpose."

On January 18, 1982, President Reagan transmitted to Congress proposed legislation to deny tax-exempt status to schools that are racially discriminatory. The proposal, which would be retroactive to July 10, 1970, would prohibit the granting of tax-exempt status to private schools with racially discriminatory policies. This proposal is described in Part VI, below.

In his transmittal letter, the President stated that "I pledge my fullest cooperation in working" with Congress "to enact such legislation as rapidly as possible." The President further stated that he had been advised that the Treasury Department would not act on any applications for tax exemptions filed in response to the Treasury policy announced on January 8, 1982, until Congress has acted on the proposed legislation.

Also, on January 18, 1982, the Treasury Department announced that the Secretary of the Treasury has instructed the Commissioner of Internal Revenue not to act on any applications for tax-exempt status filed in response to the new Treasury policy announced on January 8, 1982, except in the cases of Bob Jones University and Goldsboro Christian Schools, Inc., until Congress has acted on the proposed legislation.

[1] The Memorandum identified these IRS rulings as Rev. Rul. 71–447, 1971–2 C.B. 230; Rev. Proc. 72–54, 1972–2 C.B. 834; Rev. Rul. 75–231, 1975–1 C.B. 158; and Rev. Proc. 75–50, 1975–2 C.B. 587. These rulings are described in Parts IV–D and IV–E, below.

III. INTERNAL REVENUE CODE PROVISIONS

Tax exemption under section 501(c)(3)

Section 501(a) of the Internal Revenue Code of 1954 provides for the exemption from Federal income tax of certain organizations described in section 501(c)(3). These are organizations that are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual," and which meet certain other specified requirements.[1]

Service performed by employees of an organization described in section 501(c)(3) is not subject to the unemployment insurance tax (sec. 3306(c)(8)) or the social security tax (sec. 3121(b)(8)(B)). However, pursuant to section 3121(k)(1), a section 501(c)(3) organization may elect FICA coverage for its employees.

Tax deductions under section 170

Section 170 of the Code generally allows income tax deductions for charitable contributions, as defined in section 170(c). Under section 170(c), the term "charitable contribution" generally includes a con-

[1] Code sec. 501(c)(3) has its origin in sec. 32 of the Tariff Act of 1894, which provided for the exemption from income tax of "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes" (Tariff Act of 1894, ch. 349, sec. 32, 28 Stat. 556). A similar exemption provision was included in every subsequent revenue act prior to the 1954 Code (1939 Code, sec. 101(6)); Revenue Act of 1938, ch. 289, § 101(6), 52 Stat. 481; Revenue Act of 1936, ch. 690, § 101(6), 49 Stat. 1674; Revenue Act of 1934, ch. 277, § 103(6), 48 Stat. 700; Revenue Act of 1932, ch. 209. § 103(6), 47 Stat. 193; Revenue Act of 1928, ch. 852, § 103(6), 45 Stat. 813; Revenue Act of 1926, ch. 27, § 231(6), 44 Stat. 40; Revenue Act of 1924, ch. 234, § 231(6), 43 Stat. 282; Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 253; Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1076; Revenue Act of 1916, ch. 463, § 11(a)(6), 39 Stat. 766; Tariff of 1913, ch. 16, § 11(G)(a), 38 Stat. 172; Tariff of 1909, ch. 6, § 38, 36 Stat. 113).

The statutory provision for exemption of certain organizations (now Code sec. 501(c)(3)) has been amended eight times since 1913. The statutory provision was amended in 1913 to provide a reference to "scientific" purposes (Tariff of 1913, ch. 16, § II(G)(a), 38 Stat. 172); in 1918, to add a reference to purposes of "prevention of cruelty to children or animals" (Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1076); in 1921, to add a reference to "literary" purposes (Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 253); in the 1954 Code, to add a reference to purposes of "testing for public safety" (1954 Code, sec. 501(c)(3)); and in 1976, to add a reference to certain "amateur sports competition" purposes (Tax Reform Act of 1976, sec. 1313, 90 Stat. 1730). A prohibition against certain activities to influence legislation was added in 1934 (Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 700), and amended in 1976 (Tax Reform Act of 1976, sec. 1307(d)(1)(A), 90 Stat. 1727), and a prohibition against certain political campaign activities was added in the 1954 Code (1954 Code, sec. 501(c)(3)).

tribution or gift to, or for the use of, an organization that is organized and operated exclusively for the same purposes as enumerated in section 501(c)(3).[2] Thus, a private school that is exempt from tax under section 501(c)(3) generally is entitled to receive contributions that are deductible by the donors. Bequests and gifts to organizations described in section 501(c)(3) also are deductible under the estate and gift tax provisions (secs. 2055, 2522).

Recognition of tax-exempt status

Prior to enactment of the Tax Reform Act of 1969, an organization which met the requirements of section 501(c)(3) was tax exempt whether or not it applied to the IRS for a determination letter recognizing its exempt status. However, pursuant to the 1969 Act, an organization organized after October 9, 1969, generally is not treated as exempt under section 501(c)(3) unless it applies for recognition of its exempt status. This requirement does not apply to churches (and their integrated auxiliaries), to conventions or associations of churches, to organizations (other than private foundations) whose annual gross receipts normally are not more than $5,000, and to certain other organizations which the Treasury may exempt by regulation (sec. 508).

An organization seeking recognition of exempt status under section 501 is required to file an application with the District Director of Internal Revenue for the district where the principal place of business or principal office of the organization is located. A ruling or determination letter will be issued to an organization by the Internal Revenue Service if the organization's application and supporting documents establish that it meets the particular requirements of the section under which exemption is claimed. Exempt status will be recognized in advance of an organization's operations if proposed operations can be described in sufficient detail to permit a conclusion that the organization will meet the particular requirements of the section under which exemption is claimed. In order to qualify for exemption, the organization is required to describe fully the activities in which it expects to engage, including the standards, criteria, procedures, or other means adopted or planned for carrying out the activities; the anticipated source of receipts; and the nature of contemplated expenditures. Under certain circumstances, the IRS may require submission of a record of actual operations before an exemption determination may be issued.

Code section 7428, added by the Tax Reform Act of 1976, provides that the U.S. Tax Court, the U.S. Court of Claims, or the U.S. District Court for the District of Columbia has jurisdiction in the case of any actual controversy involving an IRS determination (or failure to make a determination) as to the initial qualification, or continuing qualification, of an organization as tax exempt under section 501(c)(3), and as a qualified charitable donee under section 170(c). Under certain circumstances, contributions (not to exceed $1,000 per individual per organization) made after an adverse determination by the IRS and during the period of litigation over tax-exempt status may be deduct-

[2] However, a contribution to a tax-exempt organization that is organized and operated for the purpose of testing for public safety is not included in the section 170(c) definition of charitable contributions.

ible even though the court ultimately determines that the organization had lost its status as an eligible charitable donee under section 170(c). Section 7428 applies with respect to IRS determinations (or requests for IRS determinations) made after January 1, 1976.

Information from tax-exempt organizations

Present law (sec. 6033) provides generally that every organization exempt from tax under section 501(a) must file an annual information return, showing its gross income, receipts, disbursements, and such other information as prescribed by Treasury regulations. However, this filing requirement does not apply to churches (and their integrated auxiliaries), to conventions or associations of churches, to organizations (other than private foundations) whose annual gross receipts normally are not more than $5,000, to the exclusively religious activities of any religious order, and to other organizations which the Treasury may exempt by regulations.

Section 7605(a) imposes certain restrictions on IRS examination of a church (or convention or association of churches). That provision generally precludes the IRS from examining religious activities of such an organization for any purpose other than to determine whether the organization qualifies for tax exemption as a church (or convention or association of churches).

Restriction on exemptions for social clubs

In 1976, Congress added a provision to section 501 that generally denies tax exemption to an organization described in section 501(c)(7) [3] if its charter, bylaws, or other governing instrument (or other written policy statement) contains a provision that provides for discrimination against any person on the basis of race, color, or religion (sec. 501(i)). The purpose of enacting section 501(i) was to overrule the portion of the decision in *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.D.C. 1972), which held that social clubs could be exempt from tax notwithstanding racially discriminatory membership policies.[4]

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[3] These organizations are clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of private shareholders. Services performed for these organizations are not exempt from FICA tax or FUTA tax, and contributions to these organizations are not deductible as charitable contributions. Furthermore, these organizations are taxed on income other than from members (sec. 512(a)(3)).

[4] In the *McGlotten* case, the three-judge U.S. District Court for the District of Columbia distinguished social clubs (exempt under section 501(c)(7)) from fraternal organizations (exempt under section 501(c)(8)). The Court stated that the section 501(c)(7) exemption, which is limited to membership-generated funds, does not operate as a grant of Federal funds. The Court noted that "Congress has determined that in a situation where individuals have banded together to provide recreational facilities on a mutual basis, it would be conceptually erroneous to impose a tax on the organization as a separate entity." The Court further found that there was no other act of Government involvement in racial discrimination by section 501(c)(7) organizations. Accordingly, the Court concluded that the section 501(c)(7) exemption did not violate the U.S. Constitution or come within the prohibition of the 1964 Civil Rights Act against Federal financial assistance to racially discriminatory programs or activities.

However, the Court further concluded that the exemption for fraternal organizations under section 501(c)(8) stood on a different footing than the section 501(c)(7) exemption. The Court considered the most crucial difference to be the

The Senate Finance Committee Report on the legislation adding this provision (P.L. 94–568) states that: "In view of national policy, it is believed that it is inappropriate for a social club or a similar organization described in section 501(c)(7) to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion." [5]

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fact that fraternal organizations are not taxed on their passive investment income. The Court thus concluded that the section 501(c)(8) exemption amounted to sufficient Government involvement to invoke the Fifth Amendment to the Constitution and to fall within the prohibition of the Civil Rights Act of 1964. The Court also stated that the provision of a tax deduction for contributions to a section 501(c)(8) organization for certain charitable, etc. purposes is a grant of Federal financial assistance within the scope of the 1964 Civil Rights Act. Accordingly, the Court ruled that racially discriminatory section 501(c)(8) organizations cannot be tax exempt or eligible to receive tax-deductible contributions.

[5] S.Rep. No. 94–1318, 94th Cong., 2d Sess. (1976). The Finance Committee Report noted that the *Green* case, *supra*, had held that discrimination on account of race is inconsistent with an educational institution's tax-exempt status under sec. 501(c)(3) and with its status as a charitable contribution donee under sec. 170 (n. 5).

III. HISTORY OF POLICY REGARDING EFFECT OF RACIAL DISCRIMINATION ON TAX-EXEMPT STATUS OF PRIVATE SCHOOLS

A. *Brown* v. *Board of Education*

In 1954, the U.S. Supreme Court held that racial discrimination in public education violates the U.S. Constitution (*Brown* v. *Board of Education*, 347 U.S. 483 (1954)). In that case, the Supreme Court held that the segregation of white and black children in the public schools solely on the basis of race, pursuant to State laws permitting or requiring such segregation, is a denial to black children of the equal protection of the laws guaranteed by the Fourteenth Amendment. The Court held that such segregation would be unconstitutional even if the physical facilities and other tangible factors of separate white and black schools were equal.

B. IRS Policies Prior to 1970

In 1965, the IRS suspended issuance of exemption rulings to private schools in order to consider the effect of racial discrimination on tax-exempt status. This suspension was effectuated administratively through a supplement to the Internal Revenue Manual that was issued on November 5, 1965.

In 1967, the IRS announced that it had resumed ruling on the tax-exempt status of private schools.[1] This resumption of ruling followed "an extensive review of judicial and legislative developments in the civil rights area" to determine the effect of those developments on the qualification of private schools for tax exemption. In resuming ruling, the IRS stated that tax exemption would be denied to a private school (and contributions to the school would not be tax-deductible) if the school was operated on a segregated basis and if its involvement with the State or political subdivision was such as to make its operation unconstitutional or a violation of Federal law. However, if a private school did not have such a degree of involvement with the political subdivision as had been determined by the courts to constitute State action for constitutional purposes, then tax exemption would be available.

Also, in 1967, the IRS issued a revenue ruling (Rev. Rul. 67–325, 1967–2 C.B. 113) dealing with an organization that provided recreational facilities which were restricted to less than the entire community on the basis of race. That ruling provided that the organization was not exempt from tax and that contributions to it were not deductible. The ruling stated that "sections 170, 2055, 2106, and 2522 of the Code, to the extent that they provide deductions for contribu-

[1] IRS News Release, August 2, 1967.

tions or other transfers to or for the use of organizations organized and operated exclusively for charitable purposes, or to be used for exclusively charitable purposes, do not apply to contributions or transfers to any organization whose purposes are not charitable in the generally accepted legal sense * * *."

Under the IRS ruling policy that was in effect until July 10, 1970, tax exemption was available to a racially discriminatory private school unless there was governmental involvement with the school that constituted State action. That policy was challenged in *Green* v. *Connally*, the litigation described below.

C. *Green* v. *Connally*

Positions taken by parties in case

The *Green* case was a class action suit brought in the U.S. District Court for the District of Columbia by parents of black children attending public schools in Mississippi to enjoin Treasury Department officials from according tax-exempt status and deductibility of contributions to private schools in Mississippi that discriminated against black students. The plaintiffs argued that granting tax benefits to such schools violated the provisions of the Internal Revenue Code. In the alternative, the plaintiffs argued that if the granting of tax-exempt status to those schools were authorized by the Code, then to that extent sections 170 and 501 were unconstitutional.[2]

On July 10, 1970, during the litigation of the case in the District Court, the IRS announced that it could no longer legally justify recognizing tax-exempt status for private schools that practice racial discrimination, nor could it treat gifts to such schools as charitable deductions for income tax purposes.[3] Initially, the Government had taken the position that the plaintiffs lacked standing to sue, and that the grant of tax exemptions to private schools did not amount to unconstitutional government action.

Dan Coit and other individuals intervened in the case as representatives of the class of parents and children who supported or attended private, nonprofit schools in Mississippi that enrolled only members of the white race and that were established as an alternative for white students who did not wish to attend desegregated public schools. The intervenors' principal contention was that denial of tax exemption would violate their First Amendment right to associate in private schools of their choice.

Decision of U.S. District Court

The three-judge District Court, in *Green*, held that racially discriminatory private schools are not entitled to the Federal tax exemption provided for educational institutions and that persons making gifts

[2] During this litigation, the District Court, on January 13, 1970, issued a preliminary injunction against the IRS to restrain it from approving applications for tax-exempt status by Mississippi private schools. Furthermore, on June 26, 1970, the Court entered a supplemental order requiring the IRS to suspend advance assurances of deductibility of contributions to segregated private schools in Mississippi. See *Green* v. *Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), appeal dimissed sub nom. *Cannon* v. *Green*, 398 U.S. 956 (1970), and *Green* v. *Kennedy*, 309 F. Supp. 1150 (D.D.C. 1970).

[3] See IRS News Release, July 10, 1970.

to such schools are not entitled to the deductions provided in the case of gifts to educational institutions 330 F. Supp. 1150 (D.D.C. 1971)).

In its opinion, the Court stated that there "is at least grave doubt whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law." The Court pointed out that while "in the past the traditional law of charities embraced educational trusts for the benefit of a racially defined class, there is grave doubt whether this rule has continuing vitality in view of recent values which govern the application of charitable trust law." The Court further pointed out that the "cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities." However, the Court concluded that the ultimate criterion for determining whether private schools are eligible under the charitable organization provisions of the Code rests on Federal policy rather than on the common law.

The Court stated that it is a general and well established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy. It noted that there are a number of cases where business expense or other deductions are denied on the grounds that the allowance of the deductions would frustrate public policy. The Court cited the Civil Rights Act of 1964 as an expression of the Federal public policy against government support for racial segregation of public or private schools, and found that the Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of public policy.

Because the Court concluded that the Internal Revenue Code, as limited by the public policy doctrine, does not provide tax exemptions for racially discriminatory private schools nor deductions for contributions to such schools, it was able to avoid the issue raised by the plantiffs of whether the allowance of exemptions and deductions would be unconstitutional. The Court stated, however, that a contrary construction of the Code would raise serious constitutional questions.[4]

Responding to the arguments advanced by the intervenors, the Court also held that the First Amendment right of association does not extend to government support for policies and practices of racial discrimination among students, and that the governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the indirect economic benefit of tax exemption. While noting that it was not called upon to determine whether tax exemption would be available to a religious school that discriminated racially, the Court pointed out that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them.

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[4] "Clearly the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would be difficult indeed to establish that such support can be provided consistently with the Constitution. The propriety of the interpretation approved by this Court is underscored by the fact that it obviates the need to determine such serious constitutional claims." (330 F. Supp. at 1164–65)

Relief granted by District Court

The Court placed the IRS under a permanent injunction to deny tax exemption to private schools in Mississippi that practice racial discrimination with respect to students, and ordered the IRS to implement its decision by requiring schools seeking tax-exempt status to adopt and publish a nondiscriminatory policy and to provide certain statistical and other information to enable the IRS to determine if the schools are racially discriminatory. While the injunction granted in *Green* applied only to Mississippi private schools, the Court stated that "the underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." (This "badge of doubt" resulted from the "history of state-established segregation in Mississippi," coupled with the founding of new private schools in Mississippi at times reasonably proximate to public school desegregation litigation.) The court stated that its decree was limited to schools in Mississippi "because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class." The Court also stated that the "Service would be within its authority in including similar requirements" as to notification of nondiscriminatory policies) "for all schools of the nation.."

The Court specifically enjoined the IRS from approving any application for tax-exempt status under section 501(c)(3) of the Code for any private school located in the State of Mississippi unless such private school made the following showings in support of its application for exemption:

> (1) That the school has publicized the fact that it has a racially nondiscriminatory policy as to students, meaning that it admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school, and further meaning, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.
>
> (2) That the school has publicized this policy in a manner that is intended and reasonably effective to bring it to the attention of persons of student age (and their families) who are of minority groups. including all nonwhites.

The Court further enjoined the IRS from approving any application for tax-exempt status for any private school located in the State of Mississippi unless such school supplied the IRS with specified information, which the Court said was material if the IRS was to be in an effective position to determine whether the school had actually established a policy of nondiscrimination. The required information included:

> (1) racial composition of student body, applicants for admission, and faculty and administrative staff; and
>
> (2) amount of scholarship and loan funds, if any, awarded to students enrolled or seeking admission, and racial composition of students who have received such awards.

Affirmance by U.S. Supreme Court

The decision of the District Court in *Green* v. *Connally*, which was appealed directly to the U.S. Supreme Court by the intervenors, was affirmed by a per curiam decision in *Coit* v. *Green*, 404 U.S. 997 (1971).

The precedential effect of the Supreme Court's affirmance has been widely debated. Those who argue that the *Green* affirmance has little value as precedent point to language in another Supreme Court case, *Bob Jones University* v. *Simon*, that states as follows:[5]

> The question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501(c)(3) in *Green* v. *Connally* [citation omitted]. As a defendent in *Green*, the Service initially took the position that segregative private schools were entitled to tax-exempt status under § 501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

Those who argue that the *Green* affirmance has precedential weight contend that decisions subsequent to 1971 have made clear that the holding in *Green* was correct as a matter of Federal constitutional law.[6] They also contend that Congress recognized the precedential value of *Green* when it added section 501(i) to the Internal Revenue Code in P.L. 94–568.[7]

D. IRS Policies Following the *Green* Case

Elaboration on nondiscrimination requirement

Subsequent to the *Green* decision, the IRS further elaborated on its policy of denying tax exemption to racially discriminatory schools. Revenue Ruling 71–447, 1971–2 C.B. 230, provided that a private school which does not have a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3), and in other relevant Federal statutes, and, accordingly, does not qualify as an organization exempt from Federal income tax. The term "racially nondiscriminatory policy as to students" was defined to mean that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at the school and that the school does not discriminate on the basis of race in the administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

In support of the ruling's conclusion, the IRS stated that under the common law, the term "charity" encompasses all three of the major categories identified separately under section 501(c)(3) of the Code as religious, educational, and charitable. Thus, the ruling

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[5] 416 U.S. 725, 740 n. 11 (1974). That case, which preceded the pending litigation involving Bob Jones University, held that the Anti-Injunction Act precluded the university from maintaining an action to enjoin the IRS from revoking its tax exemption.

[6] See, for example, *Norwood* v. *Harrison*, 413 U.S. 455 (1973), holding that economic benefits cannot be extended by a State to racially discriminatory schools. *Norwood* cited the *Green* case with approval.

[7] See discussion in Part III, above.

concluded that a school which asserts the rights to the benefits provided for in section 501(c)(3) as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section.

Publicity of nondiscrimination policy

Revenue Procedure 72–54, 1972–2 C.B. 834, set forth guidelines for determining whether certain private schools that have rulings recognizing their tax-exempt status, or that are applying for tax exemption, have adequately publicized their racially nondiscriminatory policies as to students. This procedure provided that a showing that a school does in fact have a meaningful number of students from racial minorities enrolled is evidence of a nondiscriminatory admissions policy; however, such a showing would not in itself be conclusive that the school has a racially nondiscriminatory policy as to students. A school that did not establish that it operated under a bona fide racially nondiscriminatory policy as to students was required, in order to qualify for exemption, to take affirmative steps to demonstrate that it would so operate in the future. The school was required to show that a racially nondiscriminatory policy as to students had been adopted; that the policy had been made known to all racial segments of the community served by the school; and that the policy was being administered in good faith.

Revenue Procedure 72–54 provided several examples of methods by which publication of a school's nondiscriminatory policy could be made. The procedure did not require the use of any particular method, so long as the method chosen effectively made the policy known to all racial segments of the community served by the school. Examples of methods that the IRS would consider as meeting the publication requirement included the publication by a school of notice of its racially nondiscriminatory policy in a newspaper of general circulation serving all racial segments of the locality from which the school's student body is drawn; the use of broadcast media by a school to publicize its racially nondiscriminatory policy; the publication of a school's nondiscriminatory policy through its school brochures and catalogues; and communication by the school of its nondiscriminatory policy to leaders of racial minorities in such a way that they, in turn, would make the policy known to other members of their race.

E. 1975 IRS Ruling and Procedure

Revised IRS guidelines

In 1975, the IRS published Revenue Procedure 75–50, 1975–2 C.B. 587, which set forth guidelines and recordkeeping requirements for determining whether private schools have racially nondiscriminatory policies. This revenue procedure superseded Rev. Proc. 72–54, *supra*.

In general, the 1975 guidelines provide that to obtain recognition of tax-exempt status under section 501(c)(3):

(1) A school must include a statement in its charter, bylaws, or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and, therefore, does not discriminate against applicants and

(2) The school must include a statement of its racially nondiscriminatory policy as to students in all its brochures and

catalogues dealing with student admissions, programs, and scholarships.

(3) The school must make its racially nondiscriminatory policy known to all segments of the general community served by the school.

(4) The school must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

(5) As a general rule, all scholarships or other comparable benefits procurable for use at the school must be offered on a racially nondiscriminatory basis. Their availability on this basis must be known throughout the general community being served by the school and should be referred to in the publicity necessary to satisfy the third requirement in order for that school to be considered racially nondiscriminatory as to students.

The procedure also required that an individual authorized to act officially on behalf of a school which claims to be racially nondiscriminatory as to students must certify annually, under penalties of perjury, that to the best of his knowledge and belief the school has satisfied the requirements listed in the procedure.

The 1975 Revenue Procedure further provided that the existence of a racially discriminatory policy with respect to employment of faculty and administrative staff would be indicative of a racially discriminatory policy as to students, while conversely, the absence of racial discrimination in employment of faculty and administrative staff would be indicative of a racially nondiscriminatory policy as to students.

Failure to comply with the guidelines set forth in Revenue Procedure 75–50 ordinarily would result in the proposed revocation of the tax-exempt status of a school.

Applicability to church schools

In 1975, the IRS also published a revenue ruling clarifying its position that private schools operated by churches, like other private schools, could not retain tax-exempt status if they were racially discriminatory.

Revenue Ruling 75–231, 1975–1 C.B. 158, concluded that church-related and church-operated organizations conducting schools with policies of refusing to accept students from certain racial and ethnic groups would not be recognized as tax-exempt charities under section 501(c)(3). The ruling stated that "there is no basis for treating separately incorporated schools that, although church-related, teach secular subjects and generally comply with State law requirements for public education for the grades for which instruction is provided, any differently than private schools that are not church-affiliated." Similarly, in the case of a school which is directly supervised and controlled within the same legal organization as the church, the ruling stated that "a racially or ethnically discriminatory policy as to students is as contrary to Federal public policy under these circumstances as it is when the educational institution is separately incorporated."

The ruling also addressed a situation in which a church operates or controls a school which discriminates on the basis of race, and where the church asserts that this discriminatory policy is required by the tenets of the religion it embraces. The ruling stated that Supreme Court cases supported the conclusions that (1) a religious basis for an

activity does not preclude governmental interference if the activity is otherwise clearly contrary to Federal public policy and (2) that while the First Amendment bars governmental interference with religious beliefs, it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious. Accordingly, such schools were ruled not eligible for section 501(c)(3) exemption.

F. *Prince Edward School Foundation* v. *United States*

In *Prince Edward School Foundation* v. *United States*, 478 F. Supp. 107 (D.D.C. 1979), aff'd per curiam by unpublished order No. 79–1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981), the U.S. District Court for the District of Columbia applied its decision in *Green* v. *Connally*, *supra*, to private schools outside Mississippi and held that a school with a racially discriminatory admissions policy is not entitled to tax exemption under section 501(c)(3).

The District Court upheld the IRS denial of tax-exempt status to the Foundation, which operated a private school in Virginia, because the school failed to satisfy its burden of establishing that it maintained a racially nondiscriminatory admissions policy. The U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's opinion in an unpublished order, and the U.S. Supreme Court denied certiorari. Justice Rehnquist, joined by Justices Stewart and Powell, dissented to the denial of certiorari. In his dissent, Justice Rehnquist stated in part: "Given the general rule that words of a statute, including the Revenue Acts, should be interpreted where possible in their ordinary, everyday sense * * *, the authority of the Secretary of the Treasury to promulgate this policy regarding the tax status of private schools is sufficiently questionable to merit review by this Court. Perhaps, implementation by the Service of the express language of the statute will, as suggested by the District Court in *Green* v. *Connally*, create problems of a constitutional nature." The dissent also stated that "the time has come for this Court to deal with the difficult statutory and constitutional questions raised" in this case.

G. Further Proceeding in *Green* v. *Connally*

In 1976, the plaintiffs in the *Green* case sought further injunctive relief from the U.S. District Court for the District of Columbia, asserting that the IRS was not complying with the Court's continuing injunction that Mississippi private schools which are racially discriminatory must be denied exemption from Federal income tax. The District Court supplemented and modified the permanent injunction relating to the tax-exempt status of Mississippi private schools which had been entered in 1971 (*Green* v. *Miller*, 45 AFTR 2d 80–1566 (D.D.C. 1980)).

The injunction was modified, in part, to restrain the IRS from according tax-exempt status to, and from continuing any tax-exempt status enjoyed by, all Mississippi private schools that have been determined in adversary or administrative proceedings to be racially discriminatory; or that were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregated and which cannot demonstrate that they do

not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extracurricular programs. The IRS also was ordered to conduct a survey of all Mississippi private schools meeting those criteria, including all church-related schools.

As a result of the IRS survey ordered by the District Court, five private schools' tax exemptions have been withdrawn by the IRS. These schools have filed declaratory judgment actions in the U.S. Tax Court, seeking to have their tax-exempt status restored.

After the District Court's action in 1980, the IRS revoked the tax-exempt status of a number of church-affiliated schools. The Clarksdale Baptist School has been allowed to intervene in the District Court proceedings, where it contends that the IRS revocation of its tax-exempt status is a violation of the First Amendment to the Constitution. On January 6, 1982, the District Court stayed all further proceedings pending the Supreme Court's ruling in the Bob Jones University and Goldsboro Christian Schools cases (discussed below).

H. *Wright* v. *Regan*

In a companion suit, a group of parents of black children attending public schools in several States (*Wright* v. *Miller*, 480 F. Supp. 790 (D.D.C. 1979), rev'd *sub nom. Wright* v. *Regan*, 656 F. 2d 820 (D.C. Cir. 1981)), asserted that the IRS enforcement of the nondiscrimination requirement, on a nationwide basis, had been ineffective. The plaintiffs urged that the IRS be required to deny tax-exempt status to private schools that have insubstantial or no minority enrollments, that are located in or serve desegregating public school districts, and that: (a) were established or expanded at or about the time the public school districts in which they are located or which they serve began desegregating; (b) had been determined in adversary judicial or administrative proceedings to be racially segregated; or (c) could not demonstrate that they did not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems.

The District Court dismissed the suit on the ground that the plaintiffs lacked standing.[8] The District Court based its decision primarily on the grounds that the plaintiffs could not show that there was: (1) a distinct, palpable, and concrete injury; (2) an injury that was fairly traceable to the defendant's action; (3) a sufficient degree of certainty that the relief requested would remove the injury; and (4) a sufficient degree of concrete adverseness between the plaintiff and the defendant. The Court stated that any violation of the Constitution or Federal law by a school which discriminates should be remedied on a case-by-case basis through a lawsuit filed directly against the offending school. The Court further stated that recent Congressional activity (i.e., the

[8] "Standing" refers to the ability of a party to have his complaint heard by the court. In one case, the U.S. Supreme Court has stated that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

Ashbrook and Dornan amendments, which are discussed more fully below) indicated that it should not fashion a remedy in this area.

However, the U.S. Court of Appeals for the D.C. Circuit in *Wright* reversed the District Court (in a 2 to 1 decision) and recognized the right of black citizens to insist that the government "steer clear" of aiding schools in their communities that practice racial discrimination, even though such individuals had no personal interest in attending those schools. The D.C. Circuit noted that potential action by the legislature did not supply an acceptable basis for avoiding a decision on the merits, and that appropriations limitations do not purport to control judicial dispositions. The case was remanded to the District Court for decision.

The Government has petitioned the Supreme Court for a writ of certiorari on the standing issue, and further proceedings in the District Court have been stayed pending a decision by the Supreme Court on whether to grant that petition.

I. Proposed Revenue Procedures Relating to Racially Discriminatory Private Schools

The reopening of the *Green* case and the *Wright* litigation led the IRS to conclude that its prior procedures had not proved effective in identifying schools that were discriminating on the basis of race in actual operation, even though they had professed an open enrollment policy and had complied with the requirements of Revenue Procedure 75–50.

On August 21, 1978, the IRS announced prospective publication of a revenue procedure intended to revise administrative guidelines for determining whether a private school operates in a racially discriminatory manner.[9] This initial proposal was substantially and on February 9, 1979, the IRS published another proposed procedure.[10]

The proposed revenue procedure issued on February 9, 1979 would have applied to two categories of private elementary and secondary schools. The first group consisted of "adjudicated schools", which had been found to be racially discriminatory by a Federal or State court administrative agency. The second category consisted of "reviewable schools," defined as schools whose formation or substantial expansion was related to public school desegregation in the community and which lacked significant minority student enrollment.

The proposed guidelines would have required that determinations about whether schools have racially nondiscriminatory policies with respect to students be based on all applicable facts and circumstances. An administrative "safe harbor" would have been established so that schools whose minority enrollment was 20 percent (or more) of the percentage of minority school age population in the community ordinarily would not have been reviewable. The guidelines also would have provided a nonexclusive list of factors tending to show whether a school's formation or expansion was related to public school desegre-

[9] I.R. News Release 2027. This proposed revenue procedure was published in the Federal Register on August 22, 1978.

[10] I.R. News Release 2091. This revised proposal was published in the Federal Register on February 13, 1980.

gation, as well as whether a reviewable school should be tax exempt because it had made a good faith effort to attract minority students. The guidelines set forth procedures for handling revocation of exempt status, new applications for tax-exemption, and IRS National Office review of adverse determinations.

Neither of the proposed procedures was implemented. Hearings on the proposed procedures were held before the Ways and Means Oversight Subcommittee on February 20, 21, 22, 26, and 28, and March 12, 1979.

J. Appropriation Riders

Effective October 1, 1979, further IRS action regarding the issue of tax exemptions for racially discriminatory private schools was stayed by Congress through amendments to the Treasury Appropriations Act of 1980 (P.L. 96–74). Two appropriations riders, known as the "Dornan amendment" and the "Ashbrook amendment," deal specifically with the issue. The Dornan amendment provides that none of the funds made available under the Act may be used to carry out the proposed revenue procedure of August 22, 1978, or the revised proposed revenue procedure of February 13, 1979. The Ashbrook amendment as originally in force provided more generally that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

The Ashbrook amendment as currently in effect provides that funds may not be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, *court order*, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978" [emphasis added]. See Public Law 97–92 (continuing appropriations for fiscal year 1982) and H.R. 4121, as passed by the House and reported by the Senate Appropriations Committee (Treasury, Postal Service, and General Government Appropriations Act, 1982).[11]

[11] Reported from the House Appropriations Committee on July 9, 1981 (H. Rep. No. 97–171); passed by the House on July 30, 1981; reported by the Senate Appropriations Committee on September 22, 1981; and Senate consideration started, but not completed on December 14, 1981.

V. BOB JONES UNIVERSITY AND GOLDSBORO CHRISTIAN SCHOOLS, INC. CASES

A. Bob Jones University Case

Background

Bob Jones University (the "University") was founded in 1927 in Florida and was moved to Greenville, South Carolina, in 1940, where it has been incorporated as a nonprofit organization since 1952. The University enrolls approximately 5,000 students from kindergarten through college and graduate school, and offers some 50 accredited degrees, in addition to a nondegree program in its Institute of Christian Service which teaches the principles of the Bible and trains Christian character.

The University is not affiliated with any religious denomination, but is devoted to the teaching and propagation of its fundamentalist religious beliefs. Prior to September 1971, these beliefs prohibited admission of black students to the University. In 1971, the University revised its admissions policies so that married black students and members of other minority races were not excluded from enrollment. Since May 1975, the University has had an open admissions policy, but maintains prohibitions against interracial marriage and dating.

Until 1970, the IRS recognized the University as a tax-exempt organization described in Code section 501(c)(3). In November 1970, the IRS sent letters to numerous organizations operating private schools, including the University, announcing that no private school that maintained a racially discriminatory admissions policy was entitled to tax exemption or could receive deductible charitable contributions. After a series of administrative and court proceedings,[1] the University's tax-exempt status was officially revoked by the IRS in January 1976, because of the University's policies concerning interracial marriage and dating. The revocation was made effective from December 1970.

District Court decision

The University then paid $21 in Federal unemployment taxes with respect to one employee for 1975 and sued for a refund in the U.S. District Court for the District of South Carolina. The Government counterclaimed for approximately $490,000 in unpaid Federal unemployment taxes for the taxable years 1971 through 1975. The District Court decided that, on both statutory and constitutional grounds, the

[1] In 1971, the University filed an action in the U.S. District Court for the District of South Carolina, to enjoin the IRS from revoking its tax-exempt status. That suit culminated in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), in which the U.S. Supreme Court held that the University was precluded by the Anti-Injunction Act (Code sec. 7421(a)) from maintaining such an action, but suggested a refund suit as a means of access to judicial review.

IRS was without authority to revoke the University's tax-exempt status (*Bob Jones University* v. *United States*, 468 F. Supp. 890 (D.S.C. 1978)).

In applying section 501(c)(3), the District Court found the language of the statute unambiguous and saw no indication in the legislative history that Congress intended to limit exemptions only to organizations meeting the qualifications of charitable trusts under the common law, as the Government had argued. The Court found that the University's "primary purpose is religious and that it exists as a religious organization." It held that since section 501(c)(3) and the regulations enumerate seven separate and distinct exempt purposes, one of which is "religious," tax exemption must be granted once it is determined as a fact that the organization fits into any one of the enumerated categories. In so holding, the Court noted that the IRS nondiscrimination policy, as set forth in its rulings and procedures, applies only to educational organizations and not to religious organizations that practice racial discrimination.

The District Court proceeded to address the Government's argument that organizations which violate clearly defined Federal public policy, in this case the policy against discrimination by schools on the basis of race in the selection of students, may not be granted tax exemptions as organizations described in section 501(c)(3). The Court concluded that other courts that had applied public policy limitations in the context of section 501(c)(3)[2] to disallow tax exemptions to schools that practice racial discrimination "did not fully consider the nature of the limitation they engrafted on the statute."

Also, the District Court stated that judicially created "public policy" limitations on the allowance of tax exemptions or deductions are restricted to those cases where allowance of the tax benefit "directly and in a significant manner frustrates the clearly defined policy," such as where an expenditure itself is illegal or is paid as a penalty for an unlawful act.[3] The Court described the relationship between allowance of the University's tax exemption and frustration of the national policy against racial discrimination as "tenuous," and, furthermore, considered the IRS nondiscrimination policy, as reflected in rulings and procedures, to be an abuse of the power delegated to the IRS by Congress.[4]

The District Court also held that the revocation of the University's tax-exempt status was an unconstitutional infringement of the

[2] The Court cited the decisions in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971), and *Goldsboro Christian Schools, Inc.* v. *U.S.*, 436 F. Supp. 1314 (E.D.N.C. 1977).

[3] In support of this view, the Court cited *Tank Truck Rentals* v. *Comm'r*, 356 U.S. 30 (1953), where the Supreme Court disallowed deduction of fines for highway weight violations since allowing the deduction would frustrate sharply defined public policy and encourage violations.

[4] In this regard, the Court stated that the Government's "blanket policy announcements in Revenue Rulings and Procedures 71-447, 72-54, 75-50, and 75-231, that it will deny tax exempt status to organizations which racially discriminate, but otherwise qualify under § 501(c)(3), constitute a use by the IRS of the federal tax law as a sanction for what it considers a wrongdoing, or its idea of proper social conduct of persons of different races, uses of the Code prohibited by the Supreme Court * * *. The section is to become the IRS's mechanism for disciplining wrongdoers or promoting social change" based on its conception of Federal public policy. (468 F. Supp. at 905)

University's First Amendment right to the free exercise of its religious beliefs.[5] The religious belief involved was the University's prohibition of interracial dating and marriage and its refusal to admit any person involved in such a relationship. The Court found that U.S. Supreme Court decisions holding unconstitutional State laws which required discrimination on the basis of the race of a person's companion did not "represent a compelling public policy against this variety of racial discrimination in the private sector," and that "there has yet to be expressed any compelling public policy prohibiting racial discrimination by religious organizations." [6] Thus, it held that enforcement of the IRS nondiscrimination policy violated the University's right to practice freely its religious beliefs because it was forced to give up a valuable government benefit, i.e., its tax-exempt status and deductibility of contributions by donors, in order to practice its religion.

Reversal by Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit, in a 2–1 decision, reversed the District Court (*Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980)). The Fourth Circuit held that the revocation of the University's tax-exempt status violates neither the statutory mandate of section 501(c)(3) nor the First Amendment of the Constitution.

The Fourth Circuit rejected the District Court's conclusion that the University was entitled to tax-exempt status because it is a religious organization under one of the enumerated exempt purposes in section 501(c)(3). The Court termed this a "simplistic reading of the statute" and concluded that section 501(c)(3) must be viewed against its background in the law of charitable trusts. To be eligible for tax-exempt status, "an institution must be 'charitable' in the broad common sense, and therefore must not violate public policy." [7]

The Fourth Circuit found that the University's racial policies violated clearly defined public policy, rooted in the Constitution and a series of U.S. Supreme Court decisions, condemning racial discrimination. The Court cited *Runyon* v. *McCrary*, 427 U.S. 160 (1975), in which the Supreme Court held that, in a nonreligious setting, the equal right to contract provision, 42 U.S.C. § 1981, prohibits racial discrimination in private school admissions policies. The Court also cited equal protection cases, such as *Loving* v. *Virginia*, 388 U.S. 1 (1967) (State law prohibiting interracial marriage unconstitutional), and *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) (interracial cohabitation law held invalid). The Court held that the IRS was within its statutory authority in revoking the University's tax-exempt status

[5] The First Amendment to the Constitution, in part, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

[6] However, the Court stated that, even assuming the University was an educational organization, the revocation of its tax-exempt status was a violation of its free exercise rights.

[7] The Court cited *Green* v. *Connally* and stated that "this view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes, 26 U.S.C. § 170 (c)(2)(B)." (639 F. 2d at 151 n. 6)

and stated that the IRS "nondiscrimination policy assures that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."

The Fourth Circuit stated that the same public policy considerations apply in a religious setting. The Court cited *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (D.S.C. 1974), aff'd (without published opinion), 529 F.2d 514 (4th Cir. 1974), which held that the University s then policy of excluding unmarried blacks required the termination of Federal assistance programs to veterans at the University, under the provision of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, forbidding such Federal assistance for discriminatory schools.

The Fourth Circuit addressed the District Court's opinion that tax exemptions and deductions are subject to public policy limitations only where an expenditure itself is illegal or is paid as a penalty for an unlawful act (see *Tank Truck Rentals* v. *Comm'r*, *supra*). The Court stated that, "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. *Norwood* v. *Harrison*, 413 U.S. 455 (1973)." In *Norwood*, the Supreme Court held unconstitutional a State's textbook lending program to schools, including private schools that had racially discriminatory policies. The Fourth Circuit also stated that, "The grant of tax exempt status to any institution necessarily confers upon it a kind of monetary benefit and constitutes a form of government support. *Walz* v. *Tax Commission*, 397 U.S. 664, 674–75 [citation omitted] (1970). * * * This is not to say that the tax benefit turns the University's policy into government action for Equal Protection Clause purposes. We do think, however, that government must 'steer clear' of affording tax support to educational institutions that practice racial discrimination." (639 F.2d at 152, n. 7)

The Fourth Circuit also rejected the University's claim that revocation of its tax-exempt status violated the First Amendment of the Constitution. The Court found that the burden imposed upon the University's ability to exercise its religion was not so great as to overcome the compelling interest of the government in eliminating all forms of racial discrimination. Assuming that the University's racially discriminatory policies are motivated by sincere religious beliefs, the Court noted that application of the IRS non-discrimination policy would not prohibit the University from adhering to its policies or force any individual to violate his beliefs. Finally, the Court concluded that the uniform application of the IRS non-discrimination policy to all religiously operated schools "*avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief."

The dissenting judge in the Fourth Circuit generally agreed with the District Court's opinion that the University is a religious organization entitled to exemption under section 501(c)(3) since it qualifies under one of the exempt purposes enumerated in that statute. That judge viewed the case as one of "first impression" raising the issue of whether public policy favoring freedom of religion as expressed in the First Amendment is to be limited by public policy against indirect government support of educational institutions that discriminate on the basis of race. He found nothing to show that the two policies may not exist "side by side," stating that "There is no reason

I know of that the policy favoring non-discrimination is so strong that it will not admit the existence of a religious organization which does in fact discriminate."

B. Goldsboro Christian Schools, Inc. Case

Background

Goldsboro Christian Schools, Inc. (the "School") was organized in 1963 as a nonprofit corporation exclusively for the purpose of operating a private, fundamentalist religious school in Goldsboro, North Carolina. The School is affiliated with the Second Baptist Church of Goldsboro, which has provided both physical facilities and monetary support to the School since its founding. Since its establishment, the School has maintained a racially discriminatory admissions policy, denying admission to blacks on the basis of its religious beliefs.

The School never received a determination by the IRS that it was an organization qualified for tax exemption and other tax benefits under section 501(c)(3). On audit for the years 1969–72, the IRS determined that the School was not qualified under section 501(c)(3), and, therefore, was required to pay Federal social security and unemployment taxes for those years. The School then paid these taxes with respect to one employee for the years 1969–72 and filed a refund suit in the U.S. District Court for the Eastern District of North Carolina to recover $3,459.93 in taxes paid. The Government counterclaimed against the School to recover approximately $160,000 in unpaid Federal social security and unemployment taxes for those years.

Court decision

The issue in the District Court was whether the School was a section 501(c)(3) organization so as to qualify for exclusion from these employment taxes. The Court held that private schools maintaining a racially discriminatory admissions policy violate clearly declared public policy of the United States and, therefore must be denied the Federal tax benefits flowing from qualification under section 501(c)(3) (*Goldsboro Christian Schools, Inc.* v. *United States*, 436 F.Supp. 1314 (E.D.N.C. 1977)).

In support of its decision, the District Court cited *Green* v. *Connally*, *supra*, and referred to Federal policy as expressed in the Thirteenth and Fourteenth Amendments to the Constitution, Civil Rights Acts, and *Brown* v. *Board of Education*, *supra*, and its legal progeny. The District Court then stated:

> "Given this clearly declared federal policy against racial bars to educational institutions, it would be at least anomalous and unseemly to confer federal tax benefits (having the purpose and effect of fostering and encouraging the organizations upon whom they are conferred) upon educational institutions which do, in fact, discriminate on racial grounds. Accordingly, Section 501(c)(3) must be read as imposing a general limitation prohibiting qualification for educational organizations that do practice racial discrimination." (436 F.Supp. at 1319)

The School argued that its racially discriminatory admissions policy is based on religious belief and that denial of qualification under

section 501(c)(3) would violate the First Amendment to the Constitution. Applying tests established by the Supreme Court in this area, the District Court concluded that (1) there is a legitimate secular purpose for denying tax exemptions to schools practicing racial discrimination, (2) the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion, and (3) the policy patently avoids excessive government entanglement with and, in fact, prevents indirect government aid to, religion.

The U.S. Court of Appeals for the Fourth Circuit, in an unpublished 2–1 opinion, affirmed the decision on the authority of its decision in *Bob Jones University* v. *United States*, *supra*.

C. Current Status of Cases

In July 1981, both Bob Jones University and Goldsboro Christian Schools, Inc. filed petitions for writs of certiorari seeking U.S. legality of the denial of their tax-exempt status.

In September 1981, the Government filed a brief acquiescing in the request for certiorari. The Government argued that the Fourth Circuit correctly had held that the IRS acted within its statutory authority in revoking tax-exempt status under section 501(c)(3). In its brief, the Government also argued that the IRS nondiscrimination policy derives its force from the Congressional intent underlying the charitable exemption provisions of the Code and from "the federal government's commitment to the eradication of racial discrimination in education manifested both in the Constitution and in many federal statutes and the national policy prohibiting public subsidy of racially discriminatory educational institutions, whether public or private." The Government's brief stated that the Fourth Circuit correctly had concluded that "the unquestioned First Amendment right to free religious belief and exercise does not carry with it a guarantee of any person's or corporation's entitlement to tax-exempt status."

On October 13, 1981, the Supreme Court granted certiorari in the two cases and ordered consolidation. On January 8, 1982, the Government filed a Memorandum in the Supreme Court asking that the judgments of the Fourth Circuit Court of Appeals be vacated as moot. This Memorandum stated that the Treasury Department has initiated the steps necessary to provide Bob Jones University and Goldsboro Christian Schools, Inc. with tax-exempt status and to refund to them the Federal social security and unemployment taxes in dispute. The Memorandum stated, further, that the Treasury Department has commenced the process necessary to revoke certain published IRS rulings relating to denial of tax-exempt status to private schools with racially discriminatory policies.

On January 14, 1981, Bob Jones University and Goldsboro Christian Schools, Inc. each filed a Memorandum in the Supreme Court supporting the position of the Government that the Fourth Circuit's decisions be vacated as moot.

VI. ADMINISTRATION LEGISLATIVE PROPOSAL

General provisions

The Administration has proposed legislation to prohibit tax-exempt status for private, nonprofit educational organizations that have racially discriminatory policies.

Specifically, under the Administration proposal, an organization that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and that normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on will not be exempt from tax if the organization has a racially discriminatory policy.

Under the proposal, such an organization would have a racially discriminatory policy (and therefore be denied exemption) if (1) it refuses to admit students of all races to the rights, privileges, programs, and activities generally accorded or made available to students by that organization, or if (2) it refuses to administer its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other programs administered by the organization in a manner that does not discriminate on the basis of race.

Religious schools

The proposal contains a special rule for religious schools. Under this special rule, an admissions policy of a school, or a program of religious training or worship of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief generally would not be a racially discriminatory policy. However, if such policy, program, preference, or priority is based upon race or upon a belief that requires discrimination on the basis of race, tax-exempt status would be unavailable.

Deductibility of contributions

Finally, the proposal would deny deductions for contributions to organizations maintaining schools with racially discriminatory policies. This denial of deduction would apply with respect to income, estate, and gift taxes.

Effective date

The Administration proposal would be effective as of July 10, 1970 (the date of the IRS news release announcing its racial nondiscrimination policy as to tax-exempt status).

The CHAIRMAN. As I understand, the preference has been expressed for the first two panels to appear together. Accordingly, on the first panel we will have Mr. McNamar, Deputy Secretary, Department of the Treasury; Peter J. Wallison, General Counsel, Department of the Treasury; Edward C. Schmults, Deputy Attorney General, Department of Justice; and William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice. On the second panel we will have Roscoe Egger, Commissioner of Internal Revenue and Kenneth W. Gideon, Chief Counsel for the Internal Revenue Service, Department of Treasury.

Let me just make a brief statement for the record. Others may also wish to make statements for the record. I also want to include some information in the record.

Today, we have the first round of hearings on legislation to deny Federal tax-exempt status to private schools that discriminate on the basis of race. We will hear today only from administration witnesses. And I might say there are a number of others, including some of our colleagues, some Senators, who wish to testify at a later time. If and when that is necessary we will certainly hear Senator Hart, Senator Helms, and any other Member of Congress and any other witness. We will set a hearing date if it is determined that further hearings are necessary. I assume that will be the case, unless we find some other way out of this dilemma at some later time.

Racial discrimination in any form is abhorrent. Nevertheless, such discrimination is particularly repugnant where it restricts the availability of educational opportunity, which is one of the basic underpinnings of American democracy. Because I believe that racial prejudice is fundamentally wrong and a socially destructive force, I think it should be made clear that private schools which discriminate on the basis of race should not be eligible for the benefits of an exemption from Federal taxation. Otherwise, the Federal Government can be viewed as tacitly encouraging racial discrimination in education by conferring the advantages of tax-exempt status on discriminatory institutions.

Despite my conviction that discriminatory schools should be denied tax-exempt status, we must be careful that our zeal to eradicate racial discrimination does not result in any infringement of religious freedom, an equally strong tenet of American democracy. The majority of private schools in this country have a religious affiliation. Many of these schools sincerely believe that past Internal Revenue Service nondiscrimination policies and enforcement efforts have run roughshod over constitutionally guaranteed religious liberties.

Thus, if we are to legislate on this issue, Congress needs all the guidance it can get concerning how to resolve the conflict between nondiscrimination objectives and first amendment religious liberties. I am one who hopes that it is still possible for the Supreme Court to decide the *Bob Jones* and *Goldsboro Christian Schools* cases so that Congress can benefit from the Court's wisdom on these difficult constitutional issues.

I look forward to the light that the witnesses today can shed on this very complex issue.

First, I should like to include in the record a narrative summary of confidential administration documents submitted to the committee concerning tax exemtions for discriminatory private schools. I would ask that this summary statement be made part of the record.

[The statement follows:]

SUMMARY OF
DOCUMENTS SUBMITTED BY DEPARTMENT OF TREASURY,
DEPARTMENT OF JUSTICE AND INTERNAL REVENUE SERVICE

January 20, 1981 - October 13, 1982: The Administration Holds Off Pressure to Change its Position

Beginning with the week of President Reagan's inauguration, Treasury, Justice, and the IRS were subject to continuing correspondence from individual members of Congress, seeking to have these agencies abandon or vitiate their longstanding position that tax exemptions could not be granted to racially discriminatory private schools. Much of the correspondence was from the Mississippi Congressional Delegation, and much of their concern was directed at the court injunction in the Green case requiring the IRS to apply stringent requirements to determine whether Mississippi private schools maintained discriminatory policies. Each agency defended the validity of the basic nondiscrimination policy, admitted that there were serious questions as to how the basic policy should be enforced, and defended the Government's litigation position -- explaining that the courts would determine in due course whether the First Amendment restricted application of the nondiscrimination policy to church related schools.

In early spring, Treasury began to formulate possible legislative solutions to the problems involved in enforcing the IRS nondiscrimination policy. Enforcement had been an aggravated issue since 1979 when Congress began to prohibit Treasury from using appropriated funds to develop new administrative enforcement rules.

In the summer of 1981, Justice and IRS agreed to urge the Supreme Court to review the Bob Jones - Goldsboro cases, even though the Court of Appeals had affirmed the IRS's nondiscrimination policy below. The cases were seen as a good

vehicle to obtain a definitive Supreme Court opinion resolving the First Amendment issues and determining whether the lower courts were correct in holding that the Code prohibited tax exemptions for discriminatory schools.

October 13, 1981: Pressure Mounts on Administration

After the Supreme Court agreed to review Bob Jones - Goldsboro, on October 13, 1981, increased pressure was placed on the Administration. On October 30, 1981, Representative Trent Lott (R., Miss.) wrote to President Reagan, Attorney General Smith, Solicitor General Lee, Secretary Regan and IRS Commissioner Egger stating that the Government's position in Bob Jones - Goldsboro was "both legally and politically indefensible" and asking the Government to change its position before the Supreme Court. While Treasury, Justice and IRS officials formulated their responses to Representative Lott, the following events occurred.

Commissioner Egger advised Secretary Regan on December 8, 1981 against changing the Government's position, arguing that "the Supreme Court should be allowed to decide the issue." Egger also asked for a meeting with Regan.

Treasury General Counsel Peter J. Wallison briefed Secretary Regan on December 15, 1981 and December 17, 1981 on a possible meeting or telephone call with Representative Lott. Wallison advised Regan to support Commissioner Egger's position on the basic tax exemption issue, writing that the nondiscrimination rule "has been the position of the Service since 1970 and has many times been upheld by the courts." On December 17, 1981 Wallison advised Regan that "it is the consensus at the Service and at Treasury that the issue should be considered at the White House" before the Government's Bob Jones brief was filed at the Supreme Court. Wallison noted that he was preparing a briefing memorandum for Regan to raise the Bob Jones issue with Jim Baker or Ed Meese. Wallison advised Regan to avoid mentioning to Representative Lott that the White House will be involved, in order to preserve President Reagan's "position of non-involvement in this matter, whichever way it goes.".

Within the Justice Department, discussions were held at which career officials and recent political appointees debated whether the Government should change its position before the Supreme Court. Excerpts from President Reagan's campaign platform, and ideas from A.G. Smith's policy position criticizing judicial activism, were tools used by political appointees to try to change the Government's position. Also, Associate Deputy A.G. Bruce Fein characterized the IRS-Justice position as giving the courts a "roving commission" to override statutory mandates with changing judicial notions of public policy.

On December 15, 1981, Deputy Attorney General Schmults replied to Representative Lott on behalf of Attorney General Smith and Solicitor General Lee. Despite the active campaign within Justice to change the Government's position, Schmults wrote that the IRS nondiscrimination policy "has been approved by two United States Courts of Appeals in three separate lawsuits". He stated that "The Department has been unable to conclude that abandonment of the legal position in defense of the Commissioner's regulations in Bob Jones and Goldsboro would be expedient," and concluded "We believe that the cases now pending in the Supreme Court will squarely present the substantive issues involved, and we look to the decision of that Court for authoritative answers to the questions presented."

On December 21, 1981, Representative Lott wrote again to Secretary Regan, and responded to Deputy Attorney General Schmults, suggesting that their position was "out of line with the President's policy" and enclosing a copy of the Presidential Log of Selected House Mail. The Presidential Log vaguely recorded Lott's letter to President Reagan urging him "to intervene" in the Bob Jones case, and noted President Reagan's handwritten comment, "I think we should." Lott himself conceded that the President's comment might be ambiguous.

On December 22, 1981 Treasury General Counsel Wallison advised Secretary Regan and Deputy Secretary McNamar to bring the entire issue to the White House, before the Bob Jones brief was filed on December 31, 1981. Wallison reviewed the case law, and concluded, at that time, that it was possible that affirmance of Bob Jones might not lead to an expansion of the IRS involvement in social engineering, since it was possible that the case would be read only as approving the IRS racial nondiscrimination policy. Wallison reviewed the politics of a change in the Administration's position, reasoning that some evidence suggested that "the Service's position is neither frivolous nor the implementation of the social policies of the IRS bureacracy" and concluding that a policy change could be interpreted in a way that would be politically troublesome.

December 31, 1981 - January 8, 1982: The Week The Decision Was Made

Subsequent documents do not reveal precisely when a final decision was made to ~~confess Government error~~ change the Government's position in Bob Jones and reverse the IRS nondiscrimination policy. Preparation of press releases and court documents that would be needed once the decision was made probably began on December 31, 1981. However, several high level Justice officials continued to advise against the decision until it was announced on January 8, 1982. Documents during this period reveal the following information.

On January 4, 1982 the top career attorney in the Justice Department's Tax Division warned Deputy A. G. Schmults of the adverse effect that a concession in Bob Jones would have on IRS litigation opposing judicial interference with IRS policy-making. He also advised Schmults that the Bob Jones issue would ultimately go to the Supreme Court in any event.

On January 5, 1982, William Bradford Reynolds, head of the Justice Department's Civil Rights Division, advised the Attorney General and Deputy A. G. Schmults of his views that there was no legislative support for the IRS nondiscrimination policy.

On January 8, 1982, Theodore B. Olson, head of the Justice Department's Office of Legal Counsel advised the Attorney General and Deputy A.G. Schmults of the counter-arguments that could be made to the points in the Reynolds memorandum.

The Olson memorandum includes statements by several conservative Congressmen, during the 1979-1980 Ashbrook-Dornan appropriation rider debates, acknowledging that the IRS has "more than adequate authority to strip away the tax-exempt status of private schools that practice racial discrimination."

On January 5, 1982 Treasury Assistant Secretary for Public Affairs Ann Dore McLaughlin advised Deputy Treasury Secretary McNamar on a "press strategy" to announce the change of Government position on the Bob Jones case at 4:00 p.m. on Friday, January 8, 1982, so that initial stories would reflect Treasury's explanation of the decision. No mention was made of the ATT and IBM news releases made that afternoon, but Deputy Secretary McNamar was advised to keep separate any discussion of the National Alliance case.

On January 8, 1982, Deputy Treasury Secretary McNamar personally ordered Commissioner Egger to "take the necessary steps to reverse the previous decisions of the IRS in denying tax-exempt status" to the two schools before the Supreme Court. McNamar stated his understanding that this required formal revocation of applicable revenue rulings, and a refund of their back taxes.

On January 8, 1982 the Justice Department filed a memorandum in the Supreme Court ~~confessing error, and~~ urging dismissal of the Bob Jones - Goldsboro case as moot. Justice informed the Court that Treasury had begun the process of granting tax exemptions and issuing tax refunds for the two schools, and also had "commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon" to deny the schools tax exempt status under the Code.

January 9, 1982 - February 1, 1982: Aftermath of the Decision

Bob Jones and Goldsboro both agreed with Justice's motion to dismiss the Supreme Court case. (After the President announced his decision to seek legislation to authorize the IRS nondiscrimination policy, Bob Jones University's attorney, William Ball, filed and then withdrew a memorandum urging the Court to decide the case).

On January 12, 1982, President Reagan's cabinet considered the tax exemption issue, and the President announced his decision to seek legislation "to prohibit tax exemptions for organizations that discriminate on the basis of race."

The President's proposed legislation was sent to the Congress on January 18, 1982. Senator Bob Dole introduced it in the Senate, at the President's request, as S. 2024, on Thursday, January 28, 1982. Congressman Conable has introduced the companion bill.

Treasury announced on January 18, 1982 that the IRS would not act on any applications for tax exemptions, filed in response to the January 8 policy shift, until Congress had acted on the President's bill. Specifically excluded from this statement were the two schools whose cases were before the Supreme Court.

I think the documents point out very clearly that the administration was not caught by surprise. I think there is a long record of concern and discussion regarding the issues. There were long discussions by members of the administration, many of whom had different views, I might add, on this particular issue. Now I understand that some of the documents may not be made public because of section 6103 of the tax code. I will include all the significant documents as soon as we have determined that we are not, in fact, in violation of 6103, so that members may have access to all the documents possible. I think we need to make a complete record in this very controversial area. So if there is no objection from other members of the committee, I would ask that once we've made certain that we can properly include such documents, all those documents will be made a part of the record.

[The chronological list plus documents follow:]

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MICHAEL STERN, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, D.C. 20510

CHRONOLOGICAL LIST OF KEY ADMINISTRATION DOCUMENTS

DATE	DOCUMENT
October 30, 1981	Letters from Representative Trent Lott to Secretary Regan, IRS Commissioner Egger, and Solicitor General Lee, urging change in Administration position on Bob Jones.
November 9, 1981	Letter for Secretary Regan by Assistant Secretary responding to Representative Lott.
November 30, 1981	Letter from Representative Lott to Secretary Regan requesting meeting re Bob Jones.
December 8, 1981	Memorandum from Commissioner Egger to Secretary Regan regarding private schools and Representative Lott's correspondence.
December 7, 1981	Memorandum from Associate Deputy Attorney General Bruce Fein to Deputy Attorney General Edward C. Schmults, advising Schmults on private schools.
December 8, 1981	Memorandum from Carolyn Kuhl, Special Assistant to the Attorney General to Ken Starr noting Reagan/Bush campaign statements on private schools.
December 15, 1981	Memorandum from Peter J. Wallison, Treasury General Counsel, to Secretary Regan briefing him on meeting with Representative Lott.
December 15, 1981	Letter from Deputy Attorney General Schmults to Representative Lott.
December 17, 1981	Memorandum from Treasury General Counsel Wallison to Secretary Regan regarding meeting with Representative Lott.
December 21, 1981	Letter from Representative Lott to Secretary Regan enclosing copy of President Reagan's Congressional correspondence log.

December 21, 1981	Letter from Representative Lott to Deputy Attorney General Schmults enclosing copy of President Reagan's Congressional correspondence log.
December 22, 1981	Memorandum from Treasury General Counsel Wallison to Deputy Secretary McNamar and Secretary Regan on Government's position in Bob Jones case.
December 28, 1981	Letter from Assistant Attorney General McConnell (Office of Legislative Affairs) to Representative Lott in response to Lott's letter to Schmults.
January 4, 1982	Memorandum from Tax Division Deputy Assistant Attorney General Murray to Deputy Attorney General Schmults on impact of concession in Bob Jones case.
January 5, 1982	Memorandum from Civil Rights Division Head, William Bradford Reynolds, to Attorney General Smith justifying change in Administration's position on Bob Jones.
January 5, 1982	Memorandum from Treasury Assistant Secretary for Public Affairs, Ann Dore McLaughlin, to Deputy Secretary McNamar on "press strategy" for releasing Bob Jones decision.
January 7, 1982	Memorandum from Ann Dore McLaughlin, Treasury Assistant Secretary, to Dave Gergen, White House Communications Director and Tom DeCair, Justice Public Affairs Director on "press strategy".
January 7, 1982	Memorandum from IRS Chief Counsel Gideon to Treasury Deputy General Counsel Waxman, advising on formulation of Government's ~~concession~~ statement in Bob Jones.
January 7, 1982	Letter from IRS Chief Counsel Gideon to Civil Rights Division Head Reynolds on formulation of Government's ~~concession~~ statement in Bob Jones.

January 8, 1982	Memorandum from Assistant Attorney General Theodore B. Olson (Office of Legal Counsel) to Attorney General Smith and Deputy Attorney General Schmults responding to the analysis in Reynolds' memo on Bob Jones.
January 8, 1982	Memorandum from Treasury Deputy Secretary McNamar to Commissioner Egger ordering granting of exemptions to Bob Jones and Goldsboro Christian Schools.
January 12, 1982	Cabinet Meeting Agenda
January 12, 1982	Statement by President Reagan proposing legislation to deny tax-exemptions for discriminatory schools.

TRENT LOTT
[illegible] DISTRICT, MISSISSIPPI
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
TOM M. ANDERSON, JR.

81-17016

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Congress of the United States
House of Representatives
Washington, D.C. 20515

October 30, 1981

The Honorable Donald Regan
Secretary of the Treasury
United States Department of
the Treasury
Washington, D.C. 20220

Dear Mr. Secretary:

Enclosed please find copies of my correspondence with the Commissioner of Internal Revenue and the Solicitor General. As these letters indicate, I am deeply concerned about the Government's position in this litigation. It is a position which is both legally and politically indefensible. Furthermore, it disregards the Congress by ignoring the statute and Congressional intent as expressed in the Ashbrook amendment.

I would appreciate your working with the Service to reconsider its position.

With kind regards and best wishes, I am

418838

Sincerely yours,

Trent Lott

TL/mbw

Enclosures

TRENT LOTT
[illegible] District, Mississippi
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
[illegible]

Congress of the United States
House of Representatives
Washington, D.C. 20515

[illegible]
[illegible]

October 30, 1981

The Honorable Roscoe Egger, Jr.
Commissioner of Internal Revenue
1111 Constitution Avenue NW
Washington, D. C. 20224

Dear Mr. Commissioner:

I enclose herewith a copy of my letter of today's date to Solicitor General Rex Lee regarding the position taken by the Service before the Supreme Court in Bob Jones University v. United States. I am delighted that the Service has persuaded the Court to hear the case, but I am deeply disturbed that the Service is urging a resolution completely contrary to the repeated declarations of the Congress.

I understand the difficult position in which you found yourself in Green v. Regan when you took office. The court had ordered the Service to perform certain acts contrary to the law, and the time for appeal had expired. I appreciated your efforts in securing intervention by interested parties to assert the positions which you felt the Service was barred from adopting.

Nevertheless, I cannot understand the Service's position in this case, the outcome of which will clearly control the result in the Green case. No court has ordered the Service to do anything, and you are free to urge your own construction of Section 501 (c) (3) before the Court. The Service is bound neither by the courts nor by the advice of its own lawyers, but you have nevertheless chosen a position clearly contrary to Congressional intent.

I do not wish to rehearse the legal arguments laid out in my letter to General Lee. Rather, I wish to point out the practical result of a Court decision in line with the Service's wishes. Your efforts in the future to enforce your interpretation will run squarely into the bar of the Ashbrook Amendment. The House and the Senate Committee have responded to your contention that the present language does not include court orders by adding that restriction to the Amendment. The seeds of a major confrontation among all three branches of government are plainly present in the Service's position.

It may be that you feel that you are somehow bound by the existing regulations. I should point out to you that the Ashbrook Amendment in no way binds you to the existing regulations. You are perfectly free to enforce any regulations antedating August 22, 1978, including those superseded as a result of the original Green ruling. If it is necessary to use the provisions of the Administrative Procedure Act to reinstate those former regulations which do comport with Congressional intent, then please do so immediately.

If the Supreme Court accepts the reading of the law which has been applied by your immediate predecessors, then the only possible cure is through legislation. Until that happens, you are certainly not bound by the lower courts or by your predecessors. If you do not intend to act to change the present practice, then I would appreciate your explanation in detail of your own reasons so that I can prepare the proper legislative remedies.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. Donald Regan
Hon. William French Smith

TRENT LOTT
[illegible] District, Mississippi
[illegible] Republican Whip
[illegible] Rules Committee
[illegible] Administrative Assistant
Tom H. Anderson, Jr.

Congress of the United States
House of Representatives
Washington, D.C. 20515

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202-225-5772
[illegible] District Offices
[illegible]
[illegible]
[illegible]

October 30, 1981

The Honorable Rex Lee
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Solicitor General:

I am sure you are familiar with my correspondence earlier this year with the Attorney General and the Deputy Attorney General regarding the many pending cases concerning the tax exempt status of church schools. I was disappointed to learn that you will not be involved in Bob Jones University v. United States and, indeed, that no Reagan appointee will play a major role. Please pass my concerns along to whoever is handling these consolidated cases.

I am delighted that the Administration encouraged the Supreme Court to resolve these issues. However, I am more than a little disturbed that the United States has taken a position on the merits which plainly conflicts with Congressional intent and with a specific pledge of the President's platform. I strongly encourage your office to reconsider your position.

The Government's position ignores Congressional intent. Section 501(c)(3) of the Code plainly defines exempt organizations to include bodies "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." "Charitable" is merely one of those purposes, as are "religious" and "educational." Nowhere does the statute require a religious or educational organization to be "charitable" in order to qualify for a tax exemption. If the statute is read this way, then organizations must also be "scientific" and test for public safety. Since the plain language of the statute forecloses the construction urged by the Government, ordinary rules of construction preclude looking behind the language to the legislative history.

The Government does not even bother to look at the history of this particular section as it was adopted in 1938. Rather, the United States derives its construction from subsequent unrelated Congressional actions against racial discrimination. Ordinarily, committee reports and floor remarks made long after the fact are completely irrelevant in determining the intent of a previous Congress. Furthermore, these later Congressional actions were responsive to other problems and there is absolutely no

indication that Congress intended these relatively recent actions to be read into an unrelated statute passed in 1938.

If subsequent actions are relevant, then the Government should focus upon expressions of Congressional intent on this very issue. The Ashbrook Amendment to successive Treasury appropriations prohibits absolutely the use of federal funds to "cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954." Congressional intent could not be clearer. Therefore, if the Government insists on defining Congressional intent by later actions, then certainly that intent is most clearly reflected by the Ashbrook amendment.

The Internal Revenue Service's action in revoking the tax exempt status of these schools is peculiarly reminiscent of the federal bureaucracy's activism and usurption of power during the previous Administration. Mississippians and many of their fellow citizens supported President Reagan simply to end this kind of unwarranted interference.

The last time I read the Constitution, it provided that the Congress is to make the laws--not appointed officials. The people across the country whose lives are directly affected are entitled to have the decision of their elected Representatives respected and followed by the Government. Congress has spoken, and its message is clear. It is up to the Government to enforce what Congress has done. I expect your office to reconsider its position and to report its decision to me.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. Donald Regan
Hon. Roscoe Egger, Jr.
Hon. William French Smith

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

November 9, 1981

Dear Mr. Lott:

For the Secretary, I wish to acknowledge your letter of October 30 enclosing copies of letters to the Commissioner of Internal Revenue and the Solicitor General concerning the case of Bob Jones University v. the United States, dealing with the tax-exempt status of church schools.

You will have a further response as soon as possible.

Sincerely,

(Signed)

W. Dennis Thomas
Assistant Secretary
(Legislative Affairs)

The Honorable
Trent Lott
House of Representatives
Washington, D. C. 20515

TRENT LOTT
[illegible] DISTRICT, MISSISSIPPI
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

81-18368

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Congress of the United States
House of Representatives
Washington, D.C. 20515

November 30, 1981

The Honorable Donald T. Regan
Secretary
United States Department of the Treasury
Washington, D. C. 20220

Dear Mr. Secretary:

Thank you for your Assistant's letter of November 9, 1981, in reply to my letter of October 30, 1981, concerning the tax-exempt status of Bob Jones University. I am sorry not to have responded earlier, but I know you have been as involved as I have been in the process of securing continuing funding for the government.

I am glad to know that the Service is in the process of preparing an answer. However, it has been my experience that events in this area sometimes develop a momentum of their own. I believe, therefore, that it is essential for the two of us to meet after the Service has had an opportunity to study my complaint, but before they have reached a decision.

I would propose that you and I meet early during the week of December 7, 1981. The University's brief has already been filed with the Supreme Court, and your lawyers are undoubtedly already in the process of preparing their reply. We need to resolve this matter before they get too far along.

Thank you for your cooperation, and I look forward to hearing from you at your earliest convenience.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

ACTION

Date: DEC 8 1981

MEMORANDUM FOR: SECRETARY REGAN

From: Commissioner of Internal Revenue

Subject: Private Schools - Correspondence From Representative Trent Lott

Attached is a letter I propose to send to Trent Lott responding to his letters to you, Solicitor General Lee and me. Representative Lott wants the Government to change its position in the Bob Jones case, now before the Supreme Court. In 1976, IRS revoked the tax exemption of Bob Jones University because of its racially discriminatory practices. The proposed letter declines to change position.

By way of background, in 1969 the Green case was filed challenging IRS action recognizing the tax exemption of racially discriminatory Mississippi private schools. In 1970, Commissioner Thrower announced that IRS would no longer recognize discriminatory schools as tax exempt. Also in 1970, the court in Green permanently enjoined IRS to follow this position in Mississippi. Green was appealed to the Supreme Court by a third party and affirmed. In 1971 and 1975, procedures and rulings were established by IRS to carry out this position. The legal basis for this position is that exempt organizations must be charitable in the broad legal sense. This legal position has been maintained by the IRS since at least the 1920's and has been expressly set forth in regulations since 1959. In 1976, IRS revoked the Bob Jones exemption because of its racially discriminatory policies.

Although Bob Jones prevailed before the District Court on its First Amendment arguments, the Fourth Circuit upheld the revocation. The only other circuit court to consider the issue has upheld the Service's nondiscrimination requirement in the context of a secular private school. The validity of the nondiscrimination rule applied by IRS since 1970 is squarely presented by Bob Jones. The Supreme Court should be allowed to decide the issue.

	Initiator	Reviewer	93-354	70	viewer	Reviewer	Ex. Sec.
Surname					604		I

Representative Lott's letter states that maintaining the Service's position in Bob Jones violates the Ashbrook Amendment. This is not so. The Amendment prohibits Treasury and IRS from enforcing rules proposed in 1978 and 1979 that would have imposed affirmative action requirements on some schools as a condition for exemption. Bob Jones was revoked under rules existing prior to the rules proposed in 1978 and 1979. In debates on the Ashbrook Amendment, many members of Congress stated that IRS can enforce the rules in effect before 1978.

IRS has consistently maintained a nondiscriminatory requirement since 1970 and has consistently interpreted the tax law for over 60 years to require that exempt organizations be charitable in the broad legal sense. The courts have held that organizations that violate a clearly defined public policy are not charitable in the broad sense of the word. At least since the 1954 Brown decision there has been a clear federal policy against racial discrimination in education.

IRS has supported church groups in getting their arguments before the courts. If IRS is wrong in its interpretation of the law, the Supreme Court is the proper forum to have the issue decided.

I would like an opportunity to discuss this matter with you at an early date.

Attachments

Proposed response to Rep. Trent Lott

COMMISSIONER OF INTERNAL REVENUE
Washington, DC 20224

DRAFT

Honorable Trent Lott
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Lott:

I am responding to your letter about Bob Jones University v. United States and Internal Revenue Service rules to determine the tax exempt status of church related private schools. Your letter urges the Internal Revenue Service to reverse the position taken before the courts in Bob Jones.

In 1967 the Internal Revenue Service announced that it would no longer recognize as tax exempt a racially segregated private school if its involvement with the state or political subdivision would make the operation of the school unconstitutional or a violation of Federal law. In 1969, the Green case was filed by the parents of black children in Mississippi attending public schools to challenge the granting of tax exemptions to private schools in Mississippi which discriminated on the basis of race. The Internal Revenue Service in 1970 announced that it could no longer justify granting tax exemption to private schools which discriminated on the basis of race. Rules were subsequently adopted to implement this policy nationwide. In 1975 the Service published a ruling clarifying that church related schools must also be operated on a racially nondiscriminatory basis to be tax exempt. We continue to believe that all private schools, including church related schools, must be operated on a racially nondiscriminatory basis to be tax exempt.

The revocation of the tax exempt status of Bob Jones University results from the application of these principles. Prior to 1975, the University refused to admit unmarried black students. Although the University agreed to admit unmarried black students after 1975, the rules of the University, violation of which results in expulsion, place substantial restrictions on the social interaction of black and white students. Similar restrictions were invalidated by the Supreme Court for public education even prior to the 1954 Brown decision.

Some church groups argue that the rules applied by the Service infringe upon religious liberties guaranteed by the Constitution. Fundamental constitutional issues such as these should be resolved by the courts. This is why the Internal Revenue Service urged the Supreme Court to review the favorable decision in Bob Jones and why we supported intervention of Clarksdale Baptist Church in Green.

Your letter to Solicitor General Lee suggests that the Internal Revenue Service should abandon the position that organizations described in section 501(c)(3) must also be charitable in the broad legal sense to be tax exempt. This position reflects the intent of the Congress expressed from the 1894 tax laws to the present Internal Revenue Code. It has been applied over the years by the Service in a variety of contexts to deny tax exempt status or to deny charitable deductions. It has been expressly set forth in the regulations since 1959. We believe that the Service should continue to adhere to this position.

You also suggest that a failure to change position in Bob Jones will conflict with congressional intent as expressed in the Ashbrook and Dornan Amendments. I do not agree. The purpose of the Ashbrook and Dornan Amendments has been to prohibit the Internal Revenue Service from denying or revoking tax exempt status of a private school under rules similar to those proposed in 1978 and 1979. Bob Jones deals with a revocation of tax exempt status in 1976 based upon rules then in existence. Neither the language of the amendments nor the legislative history expresses any intent of the Congress to prohibit the Internal Revenue Service from enforcing the nondiscrimination rules in effect prior to August 22, 1978.

Your suggestion that a legislative solution should be sought, within the limits of the Constitution, deserves consideration. Our understanding is that one of the original purposes of the Ashbrook and Dornan Amendments was to prohibit the Service from acting for one year until appropriate legislation could be passed.

I realize that the views expressed in your letter reflect your sincere concern with the high place which freedom of religious expression occupies in our system of government. The issues involved are not capable of easy resolution. They have been squarely presented to the Supreme Court and should be decided by that body.

With kind personal regards,

Sincerely,

ington, D.C. 20530

December 7, 1981

MEMORANDUM FOR: Edward C. Schmults
Deputy Attorney General

BCF

FROM: Bruce E. Fein
Associate Deputy Attorney General

SUBJECT: Meeting on Justice Department Briefs in Bob Jones University v. United States and Goldsboro Christian Schools v. United States

(Tuesday, December 8, 11:00 A.M. with Messrs Larry Wallace, Ken Starr, and John Murray; Rex Lee is recused from the case)

The purpose of this meeting is to alert you to the legal doctrines that the Tax Division and the Solicitor General currently intend to champion in the above-captioned Supreme Court litigation to determine whether they may be inconsistent with the litigating policies recently elucidated by the Attorney General and yourself. If you believe that there is a discrepancy, you may find it expedient to suggest a legal approach different from the one currently endorsed by the Tax Division.

The controlling issue in Bob Jones and Goldsboro is whether Congress intended §170 of the Internal Revenue Code to exclude private schools from eligibility for tax exempt status if they practice racial discrimination. An affirmative answer was given by a three judge district court in 1970 and the U. S. Supreme Court summarily affirmed. The Supreme Court has explained that summary affirmances have little doctrinal value.

Briefly stated, the legal rationale advocated by the Tax Division to justify denial of tax exempt status to private schools practicing racial discrimination is as follows:

1. Congress intended in enacting §170 some sixty years ago tacitly to bestow on federal courts authority to deny organizations that fell within the ambit of §170 tax exempt status if, after surveying contemporary national social, economic, and other policies, the courts determined that the applicant organization engaged in a practice in conflict with any such policy.

2. Although §170 was passed when both public and private racial discrimination was the norm, national policies have evolved since that time to make racial discrimination anathama to federal law. Congress, it is contended, intended to invest the federal judiciary with responsibility for detecting such a change in national policy and to alter pro tanto, the ambit of §170 in accord with contemporary national mores.

3. The Tax Division claims that the federal judiciary in these cases properly exercised a roving commission to examine all potentially eligible tax exempt schools to determine whether any should be ousted from §170 because practicing a policy that the judiciary found at odds with an overriding national policy. This expansionist view of §170, if accepted, would reflect an unprecedented entrustment of policymaking power from Congress to the judiciary.

In support of the Tax Division's views, it should be noted that they were initially endorsed under the Nixon Administration, that they are incorporated in outstanding regulations of the Internal Revenue Service, and that the incumbent Commissioner of Internal Revenue has not expressly voiced any objection to maintaining those regulations. Furthermore, to alter the government's position in Bob Jones and Goldsboro would be viewed by some as a retreat from the Department's commitment to protect civil rights.

On the other hand, the legal theory advanced by the Tax Division seems to conflict with the Attorney General's view that the Department should discourage rather than encourage judicial activism and policymaking, except when clearly mandated by statute or the Constitution. The Attorney General has stated, as you know, that the Department would not deviate from its litigating policies simply to obtain an advantage in a particular case. There is a convincing argument against interpreting §170 to exclude private schools practicing racial discrimination:

1. The statute was enacted during an era rampant with racial discrimination. It seems unlikely that the enacting Congress intended to endow courts with authority to strip schools of tax exempt status upon a finding that racial discrimination was no longer nationally acceptable. Congress, as you know, traditionally has been most reluctant to divest itself of authority over policies of taxation.

2. No substantial constitutional question would be raised by permitting private schools practicing racial discrimination to claim the exemption offered by §170. The Supreme Court has ruled that granting tax exempt status to churches or church property does not violate the First Amendment, and that offering institutions liquor licenses or similar benefits that do not actively encourage private race discrimination is constitutionally acceptable. There is thus no need in these cases to strain the interpretation of §170 to avoid a constitutional encounter.

3. The consequences of accepting the Tax Division's legal theory are daunting. It would support judicial decisions denying tax exempt status to institutions that did not accommodate the handicapped, the aged, women, and other groups currently favored in federal statutes on the ground that a tax exemption would be inconsistent with national policy. This exercise of judicial power would represent a sharp deviation from traditional congressional resistence to regulating comprehensively the affairs of nonprofit and other small entities.

The briefs in the Supreme Court are scheduled for filing in approximately one week, although it might be possible to obtain an extension. If you believe at the conclusion of the meeting that there is any merit to altering the Department's litigating position, then further consultation with the Attorney General and our client agency in the matter, the Internal Revenue Service, would be necessary.

Reagan & Bush

Reagan Bush Committee

901 South Highland Street, Arlington, Virginia 22204 (703) 685-3400

EDUCATION

As Governor, Ronald Reagan worked to increase both the quality of and access to education by boosting:

--the number of college and university scholarships from 6,000 to 31,000;

--state loans and scholarships from $4.7 million to $43.0 million;

--expenditures for state universities, and for primary and secondary schools by 105%, for state colleges 164% and community colleges by 323%, while controlling overall state spending.

As President, he would work diligently to further expand the quality of and access to America's schools.

The first step is to return control of the schools to the local level--parents, teachers, and school boards. Governor Reagan's ultimate objective is to transfer federal educational programs, along with the tax sources to pay for them, back to the state and local level. In the meantime, he favors consolidation of most federal education programs into education block grants which would give localities the widest flexibility in using federal financial support for schools.

He would instruct the federal departments to strictly limit their interference in state and local school system. In particular, he opposes the IRS's attempt to remove the tax-exempt status of private schools by administrative fiat.

Governor Reagan would attempt to expand educational opportunities by supporting eventual enactment of a tuition tax credit plan, which would permit parents to take a credit on their income tax for each child they have in private school; increased federal experimentation with education vouchers, which would increase parents' choice of which schools to which they could send their children; and restoration of the integrity of the student loan program.

He also believes that education policy should ensure equality of educational opportunity. To this end, Governor Reagan would rigorously enforce laws which prohibit intentional racial segregation, and would support voluntary integration plans such as magnet schools. However, he opposes forced busing, because it diverts both money and attention from increasing the quality of education in individual schools.

Finally, Ronald Reagan believes increased educational opportunities can best be promoted by a sound economic policy, which reduces the inflation which forces private schools and colleges into a cost-price squeeze and which reduces the federal deficits which co-opt credit necessary for state and local school systems to raise adequate revenues.

81-19081

'nter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 15, 1981

For: SECRETARY REGAN

From: Peter J. Wallison PJW
General Counsel

Subject: Your Meeting With Congressman Trent Lott.

Congressman Lott will probably raise three matters with you:

1. The position of the Internal Revenue Service and the Administration in Bob Jones University v. United States. In 1970, the tax exemption of Bob Jones University, a fundamentalist religious school, was revoked by the Internal Revenue Service on the ground that the school practiced racial discrimination. The revocation was contested at the district court level and overturned, but the Service's position was upheld by the United States Court of Appeals for the Fourth Circuit. At the urging of the Service as well as the school, the case is now on appeal to the Supreme Court. Congressman Lott is distressed by the fact that the Administration is arguing in support of the position of the Service and the Court of Appeals decision.

2. Green v. Regan. This is the Mississippi schools case with which you are familiar. In August 1981 -- at the direction of the Federal District Court for the District of Columbia -- the IRS revoked the tax exemption of five Mississippi schools on the ground that these schools failed to demonstrate that they did not practice racial discrimination.

3. The Ashbrook Amendment, an amendment to the recent continuing resolution which forbids the Treasury Department and the Internal Revenue Service from using appropriated funds to carry out any court order which would cause the loss of tax exempt status to private, religious or church operated schools. As you know, the Ashbrook Amendment sets up a constitutional confrontation of potentially historic significance, in that it forbids you from using appropriated funds to comply with a court order and thus presents a stark conflict between the powers

Surname	Initiator WALLISON	Reviewer D. THOMAS	Reviewer	Reviewer	Reviewer
Initials/Date	/	12/21	/	/	/

of Congress and the courts. On October 1, you requested an opinion of the Attorney General as to the course you should pursue in this matter, and although we have been in touch with the Justice Department regularly since that time, the Attorney General has not yet been able to make a determination.

A more complete description of each of these matters follows.

-- The Bob Jones case.

The issues in this case are simply stated but have significant ramifications. Bob Jones is an avowedly religious school with a fundamentalist philosophy which holds that mixing of the races is contrary to Scripture. The University asserts in this case that denying its tax exemption is tantamount to denying the validity of its fundamentalist beliefs and is thus an interference with the First Amendment rights of freedom of speech and religion.

The Service and the Justice Department argue that in order to be entitled to the benefits of a tax exemption an organization must be "charitable" in the broadest sense, and thus must serve and conform to the fundamental public policies of society. Since it is clearly a basic public policy of the United States to prohibit an element of discrimination based on race, any organization -- even a religious organization -- cannot be considered "charitable" if it practices racial discrimination.

This has been the position of the Service since 1970 and has many times been upheld by the courts. Congressman Lott will contend that section 501(c)(3) of the Internal Revenue Code speaks of "charitable" activities as only one of a number of activities which entitle an organization to tax exempt status (the others being, for example, religious, scientific or educational activities), and that there is no basis for asserting that a "charitable" purpose is more important than the others. He may also argue that the Ashbrook Amendment expresses a policy of Congress that the Service not deny tax exempt status to bona fide religious schools, and that this policy should overcome the public policy which opposes racial discrimination.

Congressman Lott has written to you and to Commissioner Egger concerning this matter. Commissioner Egger's draft reply is attached. In that reply, the Commissioner re-asserts the traditional position of the Service, and denies that the Ashbrook Amendment applies to the Bob Jones matter.

My own view is that you should support the Commissioner's position fully. It is one thing for government affirmatively to interfere with the rights of free speech or freedom of religion;

it is quite another for the government to grant a tax exemption which encourages activities which clearly violate the most fundamental precepts of our society. Bob Jones University may continue to pursue its religious convictions, but without tax exemption.

-- Green v. Regan.

This issue arose in June of 1981, when the Service proposed to send out letters to five Mississippi private schools revoking their tax exemptions because they had not demonstrated that they did not discriminate in their admissions policies on the basis of race. This affirmative standard to prove non-discrimination is contrary to the current position of the Service or the Administration, but was imposed by an order of the United States District Court for the District of Columbia, which held that the Service must revoke the tax exemption of any "white flight" school which was unable to establish that it did not discriminate.

Congressman Lott will express displeasure with the issuance of these letters of revocation, but he understands that the Service was acting under a court order which was put in place with the concurrence of the past Administration and with which Commissioner Egger and the current Administration are not in sympathy. Nevertheless, the five affected schools have now appealed to the Tax Court and the Service must defend its revocation actions within the next few months.

Because the Service's actions were taken pursuant to court order, Congressman Lott will not have much to complain about, but he may still assert that the Service was free to find that the five schools had demonstrated non-discrimination even though they could adduce no affirmative evidence in support of such a finding.

-- The Ashbrook Amendment.

The language of the Ashbrook Amendment purports to deny funds to the Treasury Department and the Internal Revenue Service for the purpose of formulating or carrying out "any rule, policy, procedure, regulation, standard, court order, or measure which would cause the loss of tax exempt status for private, religious or church operated schools under section 501(c)(3) of the IRC of 1954, unless in effect prior to August 22, 1978."

Congressman Lott will argue that the Ashbrook Amendment, which is now binding on the Department through its inclusion in the most recent continuing resolution, prohibits you and the Commissioner from carrying out the order in the Green case referred to above. As noted at the outset of this memo, this sets up a constitutional confrontation between Congress and

the courts, in which you and the Commissioner must choose between complying with the court order to complying with a Congressional enactment.

On October 1, you asked the Attorney General for an opinion as to the course you should adopt, but the difficulty of this question is such that Justice's Office of Legal Counsel has not yet been able to formulate a response.

Congressman Lott will certainly state that the Ashbrook Amendment binds you not to comply with the court order, but you should note the sensitivity of this matter from a constitutional point of view and say that you are awaiting advice from the Attorney General.

Congressman Lott may also state that the Ashbrook Amendment is a statement by Congress that the Administration should not be supporting the revocation of the tax exemption for Bob Jones University. This is not strictly correct. The Ashbrook Amendment by its terms applies only to actions by the Internal Revenue Service (in compliance with court orders or otherwise) after August 22, 1978. The revocation of the tax exemption for Bob Jones University occurred in 1970, and the Ashbrook Amendment does not prevent the Service or the Treasury Department from taking actions with respect to determinations made prior to August 22, 1978.

Attachment

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

DEC 15 1981

Honorable Trent Lott
U. S. House of Representatives
Washington, D. C. 20515

Dear Congressman Lott:

The Attorney General and the Solicitor General have requested me to answer your letters of October 30th concerning the cases of Goldsboro Christian Schools, Inc. v. United States, No. 81-1, and Bob Jones University v. United States, No. 81-3, now pending in the Supreme Court. As you have noted, the Solicitor General is disqualified in these cases.

When the status of private schools with reference to Sections 170 and 501(c)(3) of the Internal Revenue Code came into question around 1970, Commissioner of Internal Revenue, Randolph Thrower, after extensive study of the relevant statutory and constitutional provisions, and after review at the highest levels of the Government, announced the position of the Internal Revenue Service thereafter set forth in Revenue Ruling 71-447, 1971-2 Cumulative Bulletin 230. That position has been maintained by each of Commissioner Thrower's successors, including the current incumbent. The view of the Commissioner has been defended in litigation by the Department of Justice under the several Attorneys General then and thereafter in office. It has been approved by two United States Courts of Appeals in three separate lawsuits. The Department has been unable to conclude that abandonment of the legal position in defense of the Commissioner's regulations in Bob Jones and Goldsboro would be expedient.

We believe that the cases now pending in the Supreme Court will squarely present the substantive issues involved, and we look to the decision of that Court for authoritative answers to the questions presented. We shall of course be happy to keep you informed of any developments in the cases.

Sincerely yours,

Edward C. Schmults

Inter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 17, 1981

For: SECRETARY REGAN

From: Peter J. Wallison
General Counsel

Subject: Response to Congressman Trent Lott

I have previously furnished you with a memorandum, dated December 15, discussing the issues which Trent Lott may raise with you during a meeting or phone call this week. Further discussions of these questions within Treasury suggest that the issues in the Bob Jones case -- discussed in that memo -- are significant enough to raise at the White House level. A brief in that case must be filed with the Supreme Court by December 31 and it is the consensus among those involved in this matter at the Service and at Treasury that the issue should be considered at the White House before the brief is filed and becomes Administration policy.

I am currently preparing a full briefing memorandum for you on the subject of the Bob Jones case, preparatory to your raising the issue with Jim Baker or Ed Meese. Until we have received some guidance from the White House, it would be best to avoid any comments in conversation with Congressman Lott which commit the Administration one way or the other.

As my earlier memo indicated, the case arose out of the Service's revocation in 1970 of the tax exemption of Bob Jones University. The Service's theory -- that an organization is not entitled to tax exemption merely because it is religious in character, but that it must also be charitable in the sense that it promotes fundamental public policies -- was rejected by a federal district court but upheld by the United States Court of Appeals for the Fourth Circuit. In its brief for certiorari before the Supreme Court, the Justice Department continued to advance this argument, and certiorari was granted.

Congressman Lott will express unhappiness that this Administration is continuing to pursue this case. In response, I suggest that you tell Congressman Lott that you and your staff are currently reviewing the question -- as you would review all IRS policies which are of major significance -- and will have a response for him before the end of the year. To the extent possible, I think you should avoid suggesting to Congressman Lott that the issue will be raised in the White House -- since we may want to preserve the President's position of non-involvement in this matter, whichever way it goes.

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81-19463
Lott, T.
DGC

TRENT LOTT
LAW COMMITTEE

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 21, 1981

The Honorable Donald T. Regan
Secretary
United States Department of the Treasury
Washington, D. C. 20220

Dear Mr. Secretary:

I am delighted to learn that you are home from the hospital. I was of course disappointed that we were unable to speak last week, but the news of your recovery is especially gratifying.

In anticipation of our forthcoming conversation on the taxation of church schools, I thought you might be interested in the enclosed copy of the page from the President's log on which he responds to my letter to him on the subject. He appears to agree with me that the Administration should be helping these schools, which, of course, is not the position presently held by your Department.

This development makes it especially important that you review this matter before the brief is filed at the Supreme Court in the next few days. The President's platform promise and his apparent intention to stand by that pledge make it imperative that this matter be carefully considered before any position is expressed in public. In fact, I would think you might wish to discuss this matter personally with the President before the brief is filed.

Thank you for your continued attention, and I look forward to speaking with you soon.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

Encl.

12/21??
CRS Memo
re Sen Lott?

:ENT LOTT

\RITES REGARDING PENDING CASES CONCERNING THE TAX EXEMPT STATUS OF CHURCH SCHOOLS. INDICATES THAT THE SUPREME COURT HAS NOW AGREED TO REVIEW THE CASE OF "BOB JONES UNIVERSITY V. UNITED STATES," AND URGES YOU TO INTERVENE IN THIS PARTICULAR CASE

I think we should.

...H DISTRICT, MISSISSIPPI
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congress of the United States
House of Representatives
Washington, D.C. 20515

WASHINGTON, D.C. 20515
202-225-5772
DISTRICT OFFICES
GULFPORT, MISSISSIPPI
HATTIESBURG, MISSISSIPPI
LAUREL, MISSISSIPPI

December 21, 1981

The Honorable Edward C. Schmults
Deputy Attorney General
United States Department of Justice
Washington, D. C. 20530

Dear General Schmults:

Thank you for your letter of December 15, 1981, in response to my letter of October 30, 1981. I am still concerned that the position you report may well be out of line with the President's policy.

As you may know, I also wrote the President regarding my concern over the continuing taxation of church schools. I enclose herewith a copy of the page of the President's log on which his response is recorded. While it might be argued that his response is ambiguous, it seems to me that he is clearly agreeing that the Administration should intervene on behalf of the church schools.

I believe that it is of the highest importance to resolve this apparent conflict before any brief is filed. I am sure that the regular process of reviewing litigation does not necessarily include the President, but I believe that you should do so in this case. Given the explicit promise of his platform and his apparent intention to stand by that pledge, I do not believe that any brief should be filed which undercuts his position until he has had an opportunity to review the matter.

Thank you for your careful attention to my concerns, and I look forward to your further thoughts.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

Encl.

cc: The Honorable William French Smith

RECEIVED
DEC 22 1981
O. L. A.

PRESIDENTIAL LOG OF SELECTED HOUSE MAIL

	SUBJECT	COMMENTS
[illegible]	EXPRESSES STRONG SUPPORT FOR THE EXTENSION OF THE TARIFF ON IMPORTED FASTENERS	
[illegible] D. DINGELL ALSO SIGNED BY: PHILIP R. SHARP	COMMENDS THE ADMINISTRATION FOR NOT SUPPORTING ANY FURTHER WAIVERS OF LAW FOR THE ALASKAN NATURAL GAS TRANSPORTATION SYSTEM	
ENT LOTT	WRITES REGARDING PENDING CASES CONCERNING THE TAX EXEMPT STATUS OF CHURCH SCHOOLS. INDICATES THAT THE SUPREME COURT HAS NOW AGREED TO REVIEW THE CASE OF "BOB JONES UNIVERSITY V. UNITED STATES," AND URGES YOU TO INTERVENE IN THIS PARTICULAR CASE	I think we should.
KENNETH ROBINSON ALSO SIGNED BY: JOHN M. ASHBROOK ROBERT MCCLORY G. WILLIAM WHITEHURST C. W. BILL YOUNG	EXPRESS THEIR SUPPORT FOR THE PROPOSED EXECUTIVE ORDER ON INTELLIGENCE, AS WELL AS THEIR CONCERN OVER THE MISLEADING STORIES IN THE PRESS. IN PROTECTING OUR NATIONAL SECURITY INTEREST CONSISTENT WITH THE EXECUTIVE ORDER, SUGGESTS THAT CERTAIN MODIFICATIONS OF EXISTING STATUTES MAY BE REQUIRED, PARTICULARLY IN REGARD TO THE LIMITS IMPOSED BY THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	I'm with Justice Thurmond

Noted by DTR

81-19464

Inter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 22, 1981

For: SECRETARY REGAN

Thru: R. T. McNamar R.T.M.

From: Peter J. Wallison PJW
General Counsel

Subject: Treasury Position on Bob Jones Case

In an earlier memorandum to you, I discussed in summary fashion the kinds of questions which Congressman Trent Lott would be likely to raise concerning the Bob Jones case and the related case of Green v. Regan. Further review of these issues within Treasury suggests that they are significant enough to raise at the White House level now, so that the Administration's position can be finally settled before the Justice Department's brief is filed in the Supreme Court on December 31.

The brief-filing requirement provides a good reason for raising this issue at the White House as soon as possible, and would also place us in a position to respond to Congressman Lott without substantial additional delay.

As noted in my earlier memo, the Service and the Justice Department have taken the position that a tax exempt religious school must be "charitable" in the broadest sense in order to be entitled to retain its tax exempt status. Thus, the mere fact that the school is a bona fide religious organization does not entitle it to a tax exemption, even though § 501(c)(3) of the Internal Revenue Code lists religious organizations as one of the categories of groups which are entitled to tax exempt status. The Service contends that in enacting Section 501(c)(3) of the Code, Congress intended to provide tax exemption only to those organizations which were "charitable" within the broad meaning of that word as used in common law. This means that the organization cannot pursue practices which are inconsistent with the most fundamental public policies of society, and in particular may not practice racial discrimination.

Surname	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
	WALLISON			ARNOLD	DPICKFORD
Initials/Date	▶	▶	▶	▶	

In its most general terms, the question here is whether any organization which is bona fide religious or educational is entitled to a tax exemption no matter what its practices.* Some people are very comfortable with the proposition; others believe that Congress could not have intended to provide the significant benefit of tax exemptions to organizations which practice racial discrimination.

In the Bob Jones case, the Service encountered an institution which, although tax exempt and bona fide religious, overtly practiced racial discrimination because of its fundamentalist reading of Scripture.

That the Service has the authority to revoke the tax exemption of organizations which practice racial discrimination has been upheld in the Bob Jones case by the United States Court of Appeals for the Fourth Circuit and, in another case, by a three-judge panel of the Federal District Court for the District of Columbia. Indeed, it does not seem unreasonable that an organization which discriminates on the basis of race is not "charitable" in the broadest sense and therefore should not be entitled to the benefits of tax exemption.

On the other hand, it must be recognized that once this principle is adopted it is difficult to find a stopping point. With a broad enough decision in Bob Jones, the Service could challenge a range of private schools for enforcing racially discriminatory policies de facto -- even though the distinctive feature of Bob Jones is that it established its discriminatory rules overtly. Moreover, a far-reaching decision of the Supreme Court could conceivably form the basis for other challenges to tax exempt organizations which are engaged in practices which arguably are not "charitable" -- e.g., churches which will not perform ceremonies in which members marry outside the faith. This, in my judgment, is the most serious objection to the principle articulated by the Service in the Bob Jones case.

However, given the current composition of the Supreme Court, I think it is possible that any endorsement of the Service's position will be based on narrow grounds. Such a decision would hold that the Service may revoke the tax exemption of a school

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*. It should be noted that the beliefs or ideas which are inculcated or taught at the school or other organization are not the issue; the issue is the school's practices. The tax exemption of Bob Jones University was revoked not because it teaches that Scripture requires separation of the races but because it implements that belief by discriminating on the basis of race.

which is not "charitable" because it practices racial discrimination, but the Court's opinion would emphasize that the Bob Jones case is unusual in that the school practiced racial discrimination openly and as a matter of policy. In the ordinary case, the Service must present some evidence of discrimination in order to prevail, and this is difficult to obtain without the unusual facts of Bob Jones.

Thus, even if the Service wins Bob Jones, the case is unlikely to lead to substantial litigation over the revocation of tax exemptions unless the organizations involved practice racial discrimination as a matter of policy. If Bob Jones is viewed in this way, it will still provide a useful Supreme Court determination as to whether schools which discriminate on racial grounds are entitled to tax exemption, but will not provide a rationale for aggressive IRS action against tax exempt organizations on other theories or on other fact patterns.

At the same time, one must consider the politics of a change in the Administration's policy with respect to Bob Jones at this point. The case was commenced during a Republican Administration in 1970 and carried through a successful appeal to the Fourth Circuit Court of Appeals. This suggests that the Service's position is neither frivolous nor the implementation of the social policies of the IRS bureaucracy. If the Administration were now to take the position that the case should not be pursued before the Supreme Court, that view would be read as a statement by the Administration that overtly discriminatory practices are not objectionable, and as a significant retreat from the past policies in this area of both Republican and Democratic Administrations. The explanation of the Administration's position -- that the tax laws are not the proper vehicle for pursuing racial discrimination -- would be lost in the ensuing outcry.

To summarize, then, the Bob Jones case is not in my view troublesome if it upholds the authority of the Service to challenge tax exemptions for private schools which discriminate -- as in Bob Jones -- as a matter of policy. At the same time, I believe in the Administration's support for the Service's position in the Bob Jones case could be very troublesome -- with the political benefits heavily outweighed by the political liabilities.

a change

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

December 28, 1981

Honorable Trent Lott
House of Representatives
Washington, D. C. 20515

Dear Congressman Lott:

The Deputy Attorney General has asked me to acknowledge receipt of your letter to him of December 21, 1981 concerning the Administration's position in the cases of Goldsboro Christian Schools, Inc. v. United States and Bob Jones University v. United States.

Your concerns and the specific points you raise in your letter have been referred to the appropriate individuals and have been raised with the Department of Treasury.

Sincerely,

Robert A. McConnell
Assistant Attorney General

93-354 O—82——6

Memorandum

Subject: Impact of Bob Jones and Goldsboro Concession on Standing to Sue Litigation

Date: January 4, 1982

To: Edward C. Schmults
Deputy Attorney General

From: John F. Murray
Deputy Assistant Attorney General
Tax Division

As I advised you at the conference last Thursday, the Tax Division fears that concession of the Bob Jones and Goldsboro cases at the Supreme Court level will have a substantial adverse effect on our position on standing to sue. The basis for that fear cannot be demonstrated syllogistically or by conventional logical analysis. On the other hand, the belief that we would be worse off is based upon the perceptions of experienced litigators as to judicial attitude and behavior, and, as such, merits consideration.

For more than ten years, the Tax Division has opposed, on grounds of lack of standing, numerous efforts of plaintiffs describing themselves as taxpayers, or otherwise interested parties, to obtain injunctive orders directing the Secretary of the Treasury and the Commissioner of Internal Revenue to administer some one or more provisions of the Internal Revenue Code not in accordance with current practice but in accord with their particular desires. Wright v. Regan, 656 F. 2d 820 (C.A. D.C., 1981), now pending in the Supreme Court as Regan v. Wright on the Secretary's petition for certiorari (No. 81-790), is only a recent manifestation of such efforts. Many of these cases have raised questions of exemptions, but they have not been confined to that area. See, e.g., Tax Analysts & Advocates v. Blumenthal, 566 F. 2d 130 (C.A. D.C., 1977), cert. denied, 434 U.S. 1086 (1978), involving a challenge of Treasury's position with respect to foreign tax credits.

After the three-judge district court accepted the Treasury's substantive position on discriminating private schools in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), the question remained whether we should seek certiorari to question the standing of the plaintiffs to maintain that suit. In recommending against certiorari, we acted upon the belief that such a case, involving racial discrimination, would present our standing position in a highly unfavorable context.

Although standing is analytically a threshold jurisdictional question in every case, it has many facets, and can rarely be completely severed from the substantive claim that the plaintiff seeks to present. Cf., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972). We were pleased, accordingly, that when the standing question did reach the Supreme Court, it was in the context presented in Eastern Kentucky, in which the plaintiffs sought to require the Treasury to deny a hospital's exemption because it did not afford them free medical treatment.

Should Bob Jones and Goldsboro be disposed of without decision, Wright v. Regan, would remain. If the Supreme Court should deny certiorari, we would be governed by the unfavorable decision of the Court of Appeals on standing, and would be back in the District Court where the plaintiff would undoubtedly take the position that the plaintiffs in Green had taken, i.e., that it is unconstitutional for the Treasury to grant exemption to an institution discriminating along racial lines. That question was avoided in Green when the Treasury announced its position in 1970, and it was assumed that, had the Treasury not so acted, the District Court was prepared to uphold the plaintiffs' position. What the result would be today can hardly be asserted with any confidence. On the other hand, should the Supreme Court grant certiorari in Wright v. Regan, we would have the standing question presented to a Court fully aware of the statutory and constitutional questions in the background and aware that more than details of administration are involved. Indeed, in our petition for certiorari in Wright v. Regan, though the question presented is limited to the standing issue, we have referred to the substantive position taken in Goldsboro and Bob Jones.

The Court of Appeals was able to distinguish Eastern Kentucky and decide the standing question against us in Wright v. Regan. And while its opinion seems forced, there is no reason to believe that the Supreme Court could not distinguish Eastern Kentucky in a more sophisticated manner if it disapproved on substantive grounds the action taken by the Government in disposing of Bob Jones and Goldsboro without decision. We should then be faced with a standing decision that would encourage widespread challenges to Treasury positions not only by taxpayers but by other persons alleging that Treasury and Internal Revenue positions were unduly favorable to taxpayers.

In sum, we believe that disposing of Bob Jones and Goldsboro without decision on the merits would simply postpone disposition of the issue there until Wright v. Regan finally is decided, and that our standing position meanwhile would be placed at hazard in an extremely unfavorable context.

cc: Bruce Fein
Associate Deputy Attorney General

Charles Cooper
Special Assistant to the
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 5, 1982

To: The Attorney General

From: Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

WBR

Re: Bob Jones University v. United States - No. 81-3

Goldsboro Christian Schools v. United States - No. 81-1

Currently pending before the Supreme Court on writs of certiorari are the above-referenced cases in which petitioner educational institutions challenge the Fourth Circuit's decisions that the Commissioner of Internal Revenue acted within his statutory authority in denying tax exempt status to Bob Jones and Goldsboro under Section 501(c)(3) of the Internal Revenue Code of 1954 and under Sections 170(a) and (c)(2) of the Code. The Treasury Department, through the Tax Division of the Department of Justice, argued below that the Commissioner's denials of a tax exemption was authorized, and that position was maintained in the memorandum of the United States, filed earlier in the Supreme Court, acquiescing in certiorari in the Supreme Court.

For the reasons summarized below, and set forth in considerably more detail in the memorandum attached hereto, I am of the opinion that the Commissioner's ruling denying tax exempt status to these private educational institutions finds no support in either the language or the legislative history of Section 501(c)(3). As a matter of both law and

policy, my recommendation would be for the United States to confess error in the Supreme Court in Bob Jones and Goldsboro.

As a starting point, we can accept as given the fact that both Bob Jones and Goldsboro are "educational" non-profit organizations, the curriculum of which has a strong religious emphasis. It is also uncontested that both schools have policies that are admittedly racially discriminatory.1/ This latter fact led to the denial of tax-exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization, based on a 1970 opinion of the Internal Revenue Service announcing that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racial discriminatory policies and that it would not continue to treat gifts to such schools as deductible contributions under Section 170. 2/

The central issue before the Supreme Court at the present time is whether the 1970 Internal Revenue Service opinion is a proper interpretation of Section 501(c)(3). To state it another way, did Congress intend to deny tax exempt status

1/ Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. Similarly from its inception Bob Jones has maintained a racially restrictive policy, also based on religious tenents, forbidding its students to engage in interracial dating and interracial marriage.

2/ This opinion marked a clear departure from the position taken by the Internal Revenue Service in the preceding years. The Service's reinterpretation of Section 501(c)(3) was spurred by litigation. In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under §501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501(c)(3), but it reversed its position prior to entry of the district court's decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 no. 11 (1974).

under Section 501(c)(3) to non-profit educational institutions that, on the basis of sincerely held religious beliefs, maintain racially discriminatory admissions policies or other racially discriminatory practices? I think not.

The search for congressional intent must, of course, begin with the words of the statute to be construed. E.g., Northwest Airlines, Inc. v. Transport Workers Union, ___ U.S. 101 S. ___ Ct. 1571, 1580 (1981); United States v. Oregon, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis added). By separately enumerating eight purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them with the disjunctive "or," Congress clearly manifested its intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.") 3/ Equally clear from the separate references in Section 501(c)(3) to "educational" and "charitable" organizations is "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." Prince Edward School Foundation v. United States, ___ U.S. ___, 101 S. Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

Indeed, the regulations promulgated by the Internal Revenue Service under Section 501(c)(3) are wholly inconsistent with the statutory interpretation it now advocates. According

3/ This common sense interpretation of the plain language of Section 501(c)(3) is confirmed by sister provisions in the Internal Revenue Code subchapter dealing with exempt organizations. Thus the language used by Congress in Sections 503, 504 and 513 of the Code unmistakably reflects a congressional intent to recognize each of the purposes or functions enumerated in Section 501(c)(3) as a discrete and independent "basis for . . . exemption of Section 501(a)." See 26 U.S.C. §§ 503(b)(3), 504(a)(1) & (c) and 513(a).

to §1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for one or more of the following purposes: (a)Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. §1.501(c)(3)-1(d)(1)(i) (emphasis added). The regulations state further that

> since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . . . For example, if an organization claims exemption on the ground that it is "educational," exemption will not be denied if, in fact, it is "charitable"." 26 C.F.R. §1.501(c)(3)-1(d)(1)(iii) (emphasis added).

Thus, under both the statute and the Service's interpretive regulations, an organization is entitled to tax-exempt status if it is organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational."4/ Accordingly, the contrary

4/ Even if it could reasonably be concluded that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(3)(c), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(3)(c) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus do violence to the familiar rule that statutes be construed to give effect to each word and that no one part of a statute be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

interpretation of Section 501(c)(3) adopted by the Service and the Fourth Circuit must fall, for "[t]he courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." National Life and Accident Ins. Co. v. United States, 524 F. 2d 559, 560 (6th Cir. 1975).

Where the statutory language is as clear and unambiguous as Section 501(c)(3), courts ordinarily do not delve deeper in order to divine the intent of Congress. E.g., Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 492 (1947). Even so, the interpretation advanced by the Commissioner and Court of Appeals in these two cases finds no support in the statute's legislative history.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556, 5/ which provided in pertinent part: "[N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes." There is no indication that Congress intended to distinguish religious and educational colleges from charitable organizations, or that its aim was to incorporate the "common law of charitable trusts" in this taxing statute.

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, 38 Stat. 114, 166, which exempted from the income tax:

> Any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Under the common law, of course, the income of a charity could not inure to the benefit of a private person. See 4A Scott, The Law of Trusts §376(2)(d) ed. 1956. Thus, inclusion of

5/ This corporate income tax act was later declared unconstitutional by the Supreme Court in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

a requirement to that effect in the statute was unnecessary if Congress had intended to import the common-law of charitable trusts into the exemption.

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes, including purposes which would have been within the initial exemption if Congress had intended the word "charitable" to have its common-law meaning.6/ In each succeeding revenue act, however, including the 1954 Code, Congress simply reenacted its initial language exempting any organization devoted to "religious, charitable, . . . or educational purposes."7/ The interpretative regulations issued by the Internal Revenue Service in connection with these revenue acts uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor" rather than in its broader common-law sense. 8/

6/ For example, the Revenue Act of 1918, 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." Similarly, the Revenue Act of 1921, 42 Stat. 227, expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad-law sense.

7/ See Revenue Act of 1918, Ch. 254, §231(6), 40 Stat. 1057; Revenue Act of 1921, Ch. 98, §231(6), 42 Stat. 227; Revenue Act of 1924, Ch. 176, §231(6), 43 Stat. 253; Revenue Act of 1926, Ch. 20, §231(6), 44 Stat. 9; Revenue Act of 1928, Ch. 562, §103(6), 45 Stat. 791; Revenue Act of 1932, Ch. 154, §103(6), 42 Stat. 169; Revenue Act of 1934, Ch. 216, §101(6), 48 Stat. 680; Revenue Act of 1936, Ch. 740, §101(6), 49 Stat. 1648; Revenue Act of 1938, Ch. 554, §101(6), 52 Stat. 447; Internal Revenue Code of 1939, Ch. 1, §101(6), 53 Stat. 1; Internal Revenue Code of 1954, Ch. 591, §501(c)(3), 68 A. Stat. 163.

8/ See I.T. 1800, II-2 c.b. 152, 153 (Revenue Act of 1921); Treas. Reg. 65, Art. 517 (Revenue Act of 1924); Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932); Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938); Treas. Reg. 103, §19.101(6)-1 (Internal Revenue Code of 1939); Treas. Reg. 111, §29-101(6)-1 (1939 Code); Treas. Reg. 118, §39.101(6)-1(b) (1939 Code).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. §1.501(c)(3)-1(d)(2). The same regulation, however, defines "educational" without any reference to the notion of charity, 9/ thus reflecting the Service's view (pre-1970) that although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under Section 501(c)(3).

In sum them, since ~~Since~~ 1894 Congress has consistently and repeatedly manifested its intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. The Commissioner's contrary interpretation of Section 501(c)(3) is inconsistent with the plain language of the statute, with the statute's legislative history, and with the Commissioner's own interpretative regulations.

Moreover, Congress has recently expressed grave reservations concerning the Service's authority to deny tax-exempt status to organizations deemed by the Service to violate public policy. Sponsors in both the House and the Senate of the Ashbrook Amendment to the Appropriations Act of 1980 (which prohibited the Service from using any funds to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious or church-operated schools under Section 501(c)(3) . . . unless in effect prior to August 22, 1978") expressed the view that the Service lacks authority to deny tax-exempt status to private educational

9/ The regulations define "educational" as follows:

> The term "educational," as used in section 501(c)(3), relates to --
>
> (a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> (b) the instruction of the public on subjects useful to the individual and beneficial to the community. 26 C.F.R. §1.501(c)(3)-1(d)(3) (1959).

institutions because of racially discriminatory policies. In passing the Ashbrook Amendment, Congress chose to preserve the status quo pending further consideration of the correctness of the Service's interpretation of Section 501(c)(3). Thus, Congress' failure legislatively to overrule the Service cannot be construed as congressional approval of the Service's interpretation of Section 501(c)(3). Even assuming arguendo that it could, however, it is well settled that approval by a subsequent Congress provides little insight into the proper interpretation of a statute -- Section 501(c)(3) -- passed by an earlier Congress. See, e.g., United States v. Wise, 370 U.S. 405, 411 (1962); United States v. Southwestern Cable Company, 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance'"). Nor can Congress' failure to overturn administrative and judicial interpretations of Section 501(c) be deemed a congressional ratification of those interpretations. See, e.g., Ex Parte Endo, 323 U.S. 283, 303 n. 24 (1944); United States v. Price, 361 U.S. 304, 310-11 (1960).

For the foregoing reasons, it is my judgment that the United States should not continue to press for affirmance of the Fourth Circuit decisions in these cases. The only issue presented is whether Congress intended by enactment of Section 501(c)(3) to delegate to the Internal Revenue Service authority to withhold tax exempt status from otherwise qualified organizations based on practices which the IRS deems to be contrary to public policy. All objective evidence of Congressional intent underscores that it did not. As a matter of policy, it is as unsound for the Executive Branch to be extending through the regulatory process the reach of legislation as it is for the courts to take such liberties.

If Congress chooses to engraft a civil rights enforcement responsibility upon the taxing authority of the Internal Revenue Service, such an intention should be clearly reflected in the law and its legislative history. Where, as here, the taxing arm of the Federal Government has not been explicitly assigned such powers, neither the Executive Branch nor the Courts should create authority that Congress has not seen fit to confer. This does not in any way condone racial discrimination, which is admittedly offensive to the most fundamental of constitutional principles. Rather, it recognizes that the Legislature is the Branch of Government charged with the responsibility of enacting statutes to combat that evil, and where it has not seen fit to use the taxing laws for that purpose, that judgment is binding on both the Executive and Judicial Branches.

nter-Office Memorandum

☐ ACTION ☐ BRIEFING ☐ INFORMATION

Date: January 5, 1982

For: DEPUTY SECRETARY MCNAMAR

From: Ann Dore McLaughlin ADM

bject: Bob Jones Decision

We recommend the following strategy for announcing the Bob Jones decision:

1. Release of the following documents: Press Release including statement by the Deputy Secretary, chronology of legal history of both cases, and a copy of Justice's motion to the Court in both cases.

2. File the motions at 4:00 p.m. with simultaneous release of press documents.

3. Hold a background briefing at 4:00 p.m. for legal reporters on key national publications including the New York Times, Washington Post, Wall Street Journal, Atlanta Journal-Constitution and Los Angeles Times. Participants to include: Deputy Secretary McNamar, Treasury General Counsel, and a Justice Department official, probably Brad Reynolds. ?

Strategy:

1. At 4:00 p.m. release of documents allows time for wire service stories to meet a.m. newspaper deadlines and make 6:00 p.m. evening television broadcasts. Release of your statement at 4:00 p.m. insures that the first wire stories out -- and thus the most widely used, especially by the broadcast media -- will contain our rationale. An earlier release would give the media more time to conduct interviews with interest groups and thus politicize the story. A later release -- one too late for the evening TV news -- might cause the networks to hold the story until the next day, which would result in the same kind of expanded political story.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	FITZWATER				

2. The initial press release would stimulate wire service stories under the most controlled situation. The background briefing would allow us to flesh out the stories in the best light possible.

3. Justice suggests keeping the National Alliance decision separate.

cc: Secretary Regan
Roscoe Egger
Peter Wallison

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

January 7, 1982

MEMORANDUM FOR: Dave Gergen
Director of Communications
White House

Tom DeCair
Director, Public Affairs
Justice Department

From: Ann Dore McLaughlin
Assistant Secretary
(Public Affairs)

Subject: Bob Jones Decision

Attached is a press release which lays out our rationale for the Bob Jones decision. Although it is still an open question whether the release should come from Treasury or Justice, following is the suggested strategy for the release:

1. Release of the following documents: Press Release including statement by the Deputy Secretary, chronology of the legal history of the case, and a copy of Justice's motion to the Court.

2. File the motion at 4:00 p.m. with simultaneous release of press documents.

3. Hold a background briefing at 4:00 p.m. for legal reporters on key national publications including the New York Times, Washington Post, Wall Street Journal, Atlanta Journal-Constitution and Los Angeles Times. Participants to include: Deputy Secretary McNamar, Treasury General Counsel, and a Justice Department official, probably Brad Reynolds.

Strategy

This is a relatively low-key strategy with maximum control of the story's content. However, because of the complexities of the case the background session with key reporters is probably a necessary ingredient.

Attachment

Internal Revenue Service
memorandum

date: January 7, 1982

to: Margery Waxman
Deputy General Counsel

from: Kenneth W. Gideon
Chief Counsel

Kenneth W. Gideon

subject: Bob Jones case

As you requested, attached is a copy of the draft Department of Justice memorandum requesting dismissal of the Bob Jones and Goldsboro cases. As I stated in our telephone conversation, my concern is that the motion be narrowed sufficiently to avoid any argument that 1959 regulations expanding the definition of "charitable" not be implicitly invalidated. A draft paragraph to be substituted for the first paragraph on page 2 is attached.

Similarly, I would again reurge that the appeal in National Alliance be allowed to continue. No public policy argument would be presented. The sole issue on appeal would be a request to the Court of Appeals to reconsider its decision invalidating the "educational" definition in the section 501(c)(3) regulations.

Execution of the decision now awaits receipt by the Commissioner of written instructions to reverse our position in the Bob Jones and Goldsboro cases.

Attachment

On reexamination of the language and legislative history of section 501(c)(3), the United States has concluded that Congress did not intend to vest the Commissioner of Internal Revenue with discretion to deny otherwise qualifying organizations tax-exemption on the basis of "public policy". Only in those situations, such as section 501(i) where Congress has acted explicitly to deny exemption, does the Commissioner possess the authority to deny exemptions on grounds of ~~policy [such as the national policy against racial discrimination]~~ articulated policy as expressed in the Statute.

CHIEF COUNSEL
Internal Revenue Service
Washington, DC 20224

January 7, 1982

William Bradford Reynolds, Esq.
Assistant Attorney General
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

Dear Brad:

While we still have not received definitive instructions to reverse our position in the Bob Jones and Goldsboro cases, I have reviewed your draft of the motion to dismiss in order to give you our comments should the decision to file be made in the near future. My principal concern is that unintended and unforeseen effects on the administration of section 501(c)(3) be avoided. Specifically, I am concerned that the first paragraph on page 2 could be read to invalidate Treasury's adoption of the common law definition of "charitable" in the 1959 regulations under section 501(c)(3). Accordingly, I would propose that the attached paragraph be substituted for the first paragraph on page 2. Hopefully, this language meets your requirements on the "public policy" issue while preserving our authority to grant exemption for trusts to maintain public buildings or lessen the burdens of government and similar situations.

Very truly yours,

Kenneth W. Gideon

Attachment

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

8 JAN 1982

MEMORANDUM TO THE ATTORNEY GENERAL
AND THE DEPUTY ATTORNEY GENERAL

Re: Bob Jones University v. United States - No. 81-3
Goldsboro Christian School v. United States - No. 81-1

In connection with your consideration of the issues which have arisen relative to the above-captioned litigation, I have certain additional observations. As I mentioned yesterday, I have not had time to thoroughly research the merits of the central issue concerning the meaning of §§ 501(c)(3) and 170(a) and (c)(2) of the Internal Revenue Code. Therefore, I have no firm conclusion on the merits, but you have received advice from an ample number of people that do. I would simply like to add the following thoughts:

1. The Legislative History During the 1970's. During the numerous debates in 1979, 1980 and 1981 with respect to the Ashbrook/Dornan Amendments which restricted IRS enforcement efforts to policies and regulations developed prior to August of 1978, various Congressmen made statements on the record concerning their understanding of existing law. The following are representative samples of statements made by supporters (except as noted) of the Ashbrook/Dornan Amendments:

(a) Congressman Ashbrook, July 13, 1979, Congressional Record - H 5882

"My amendment in no way will preclude them from making additions or revisions in the permanent law and for at least 1 year we will have kept the IRS from going forward with their August 27, 1978, regulations. This is what I am trying to do, not to say they cannot issue regulations of

any kind. As I pointed out, under their current regulation 7450 [S.C. 74-50], they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away." (Emphasis added.)

(b) Congressman Sensenbrenner, July 13, 1979, Congressional Record - H 5883

"So in sum and substance, Mr. Chairman, the regulations are purely and simply a form of harassment against the private schools of this country. The regulations that were in effect prior to August of last year or the proposals of last year were very adequate in revoking the tax exempt status of those schools that did discriminate. No one complained that they were inadequate until somebody down at the IRS came up with the proposed regulations." (Emphasis added)

(c) Congressman Grassley, July 13, 1979, Congressional Record - H 5884

"This is not to suggest that the goals of the IRS are entirely wrong. Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions." (Emphasis added)

(d) Congressman Hammerschmidt, July 13, 1979, Congressional Record - H 5884

"This is not an issue of race. In 1979 the IRS announced that racially discriminatory schools, who did not maintain an open door policy must forfeit their tax exempt status and as a result of this action by the IRS over 100 schools lost their tax exempt status. That action was sufficient and there is no need for regulations of this magnitude and expense." (Emphasis added)

(e) Congressman Dickinson, July 13, 1979, Congressional Record - H 5885

"At the present time, IRS has more than adequate authority to strip away the tax-exempt status of private schools that practice racial discrimination and I know this authority has been used effectively in a number of cases. The intelligent and sensible thing to do would be to leave it at that." (Emphasis added)

(f) Congressman Dornan, August 19, 1980, Congressional Record - H 7209

"The IRS already has sufficient authority to deal with private tax-exempt schools which discriminate because of race." (Emphasis added)

(g) Congressman Rangel, (opposing the Dornan Amendment), August 19, 1980, Congressional Record - H 7211

"Now we find that the courts have responded, and they responded specifically not only to the proposed regulations but to the constitutional obligations that we not fund schools that involved themselves in racial discrimination; and certainly no Member of the House, including the proponents of this amendment, would support that." (Emphasis added)

(h) Congressman Ashbrook, July 30, 1981, Congressional Record - H 5395-96

"I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1979, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS's ability to withdraw the tax-exempt status of any school which might violate the law." (Emphasis added)

(i) Congressman Lott, July 30, 1981, Congressional Record - H 5397
"The IRS remains free to deny exemptions to any school proven guilty of discrimination, and I have no doubt they will continue to enforce that standard as vigorously as they have in the past." (Emphasis added)

(j) Congressman Lott, July 30, 1981, Congressional Record - H 5398
"If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978." (Emphasis added)

2. Legislative History Regarding §501(c)(7).

The addition of the prohibition of a tax exemption for discriminatory social clubs occurred in 1976. The Senate Report (No. 94-1318) referred to the court decision which had held that discrimination on account of race by a social club was not prohibited by the Constitution. The Report referred to the understanding of the Committee on Finance of the United States Senate that "discrimination on account of race is inconsistent with an educational institution's tax exempt status . . ." p. 8. The report goes on to state that "In view of national policy, it is believed that it is inappropriate for a social club . . . to be exempt from income taxation if its written policy is to discriminate on account of race, color or religion." This bit of legislative history, which has been cited by the Office of the Solicitor General, is the type of legislative enactment, giving explicit recognition to what the Congress apparently believed to be the existing law concerning educational institutions, which is given considerable weight by the courts in statutory interpretation.

3. Principles of Statutory Construction.

The discussion in the Reynolds memoranda of principles of statutory construction is relatively brief. I believe that that discussion does not accurately state the principles which have been enunciated repeatedly and recently by the Supreme Court. Needless to say, no principle of statutory construction can be sufficiently dispositive of

such an issue if the Court cannot be convinced that the principles of construction are in accord with the true intent of the legislature. Therefore, I offer these observations not because they dispose of the issue, but because I believe that the law on this subject is not adequately discussed in the Reynolds memoranda. The following citations are simply samples of what the Supreme Court has said on this subject in contexts which are somewhat analogous to the instant issue.

(a) Haig v. Agee, 49 LW 4869 (1981) ("[C]ongressional acquiesence may sometimes be found from nothing more than silence in the face of an administrative policy."; "despite the long-standing and officially promulgated view that the Executive had the power to withhold passports for reasons of national security and foreign policy, Congress, in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad lawmaking authority granted in the earlier act.'").

(b) Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.")

(c) Lorillard v. Pons, 434 U.S. 575 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."; "so, too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); and

(d) Saxbe v. Bustos, 419 U.S. 65 (1974) ("This long-standing administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the act and left the practice untouched. Such a history of administrative construction and Congressional acquiesence may add a gloss or qualification to what is on its face unqualified statutory language.")

As I mentioned at the outset, I am not suggesting that the legislative history discussed above and the rules of statutory construction mentioned above are dispositive. This is a complicated issue and there has not been time, unfortunately, to review this in a manner which is consistent with the importance of the decision being made. I did feel, however, that the material set forth herein provides at least some counterweight to the materials which you are presently reviewing in connection with these issues.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: ✓Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Kenneth W. Starr
Counselor to the Attorney General

THE DEPUTY SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

January 8, 1982

MEMORANDUM FOR COMMISSIONER EGGER

Subject: Tax-Exemption for Bob Jones University and Goldsboro Christian Schools, Inc.

This memorandum is to confirm the Department's direction to you to begin the process of granting Bob Jones University and Goldsboro Christian Schools, Inc. tax-exempt status under section 501(c)(3) of the Internal Revenue Code.

After much consideration and having the benefit of discussions with you and the Department of Justice, I have decided as a policy and legal matter that the Internal Revenue Service is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy.

Therefore, I am directing you to take the necessary steps to reverse the previous decisions of the Internal Revenue Service in denying tax-exempt status to Bob Jones University and Goldsboro Christian Schools, Inc. It is my understanding that in order to accomplish this, you will also have to revoke the applicable revenue rulings under which you denied these institutions tax-exempt status and refund to them Federal social security and unemployment taxes. These steps should be taken as soon as legally possible.

R. T. McNamar

THE WHITE HOUSE

WASHINGTON

CABINET MEETING AGENDA

January 12, 1982 -- 2:00 p.m.

1.	Tax Exemptions for Private Institutions	The President
2.	Federal Labor Relations Policy	Don Devine

CABINET MEETING PARTICIPANTS

Tuesday, January 12, 1982 -- 2:00 p.m.

The Cabinet -- All Members *

* Walter Stoessel, Deputy Secretary of State-Designate for Secretary Haig

* Donald P. Hodel, Under Secretary of the Interior for Secretary Watt

* Richard E. Lyng, Deputy Secretary of Agriculture for Secretary Block

* Joseph Wright, Deputy Secretary of Commerce for Secretary Baldrige

* Charles Lichenstein, Alternate Representative to the United Nations for Ambassador Kirkpatrick

James A. Baker
Michael K. Deaver
Martin Anderson
Richard G. Darman
Kenneth Duberstein
Craig L. Fuller
David Gergen
Edwin L. Harper
Murray Weidenbaum
Rich Williamson
Larry Speakes
Daniel Murphy
Karen Hart

For Presentations:

Donald J. Devine, Director
Office of Personnel Management

Joseph Morris, General Counsel
Office of Personnel Management

Guests in attendance:

Mary Anne Wood, White House Fellow, DOD

David K. Karnes, White House Fellow, HUD

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 12, 1982

STATEMENT BY THE PRESIDENT

This issue of whether to deny tax exemptions to non-profit, private, educational institutions raises important questions and sensitive policy considerations.

My administration is committed to certain fundamental views which must be considered in addressing this matter:

— I am unalterably opposed to racial discrimination in any form. I would not knowingly contribute to any organization that supports racial discrimination. My record and the record of this administration are clear on this point.

— I am also opposed to administrative agencies exercising powers that the Constitution assigns to the Congress. Such agencies, no matter how well intentioned, cannot be allowed to govern by administrative fiat. That was the sole basis of the decision announced by the Treasury Department last Friday. I regret that there has been a misunderstanding of the purpose of the decision.

I believe the right thing to do on this issue is to enact legislation which will prohibit tax exemptions for organizations that discriminate on the basis of race.

Therefore, I will submit legislation and will work with the Congress to accomplish this purpose.

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Does anyone else wish to make an opening statement? Senator Packwood.

Senator PACKWOOD. Most of us on this committee are familiar with the issues of both freedom of religion and Government policy. There is no question that on occasion these come close to possibly being in conflict. No one would say in the name of freedom of religion that we are going to return to a day of human sacrifice and say that Government should tolerate that because it is freedom of religion. It is also the policy of this Government, not just this administration, for many administrations, that we are opposed to the abhorrent practice of racial discrimination. If there are religions that say that God tells them that blacks have been permanently consigned to a place of inferiority, they may or may not have the right to feel that way. This is not an issue that we are here to discuss. I do not believe that. I do not agree with their interpretation of the Bible if that's what they say God said. That does not mean the Government has to grant them tax exemption to practice that belief. I do not think that freedom of religion goes that far. And that is what this hearing is about.

I, frankly, am at sea as to exactly what the law is. I have followed this as closely as I can. I thought that we had put this at rest one time and that you could not have a tax exemption if your religious belief indicated that there were people who were inferior and people who were superior in this country. That may or may not be the law. If it is the law, I hope we enforce it. If it is not the law, I hope we change it so that it becomes law.

The CHAIRMAN. Senator Matsunaga.

Senator MATSUNAGA. Thank you, Mr. Chairman. When I was a youngster and I used to go to a church, one of my ministers told this old Japanese congregation that when God made man, he molded a handful of clay, put them in the oven, forgot about it, and then suddenly discovered that the clay had burned. Now this was a black man. Then, next time, he was not going to make any mistakes so he molded the clay and put it in the oven and then for fear it might be burned, he took it out too early. This is the white man. But now with that experience, he was going to do it just right so he molded another handful of clay, put it in the oven, and this time it came out just right. This was the brown man. And, of course, this came from a pulpit, mind you, to instill some pride among members of the congregation.

Well, regardless of what that is, racial discrimination is abhorrent as others have said before me. And one of the greatest things that happened in this century, I think, was the decision rendered by the Supreme Court in *Brown* v. *Board of Education*, for that decision gave more hope and a sense of belonging to a large segment of our population. I would say including the brown man or the yellow man, whichever you wish to put it. Now, the proposals before us from the administration seems to challenge the decision by the Supreme Court in interpreting the Constitution that there shall be no racial discrimination in the determination of entrance to public education. Of course, that has been expanded to include private education, which receives support from the Federal Government or even the State government.

That is the issue, I believe, that is before us today. Whether any of the two and separate and independent branches shall determine that the function of the Supreme Court was wrongfully exercised in determining that, in *Brown* v. *Board of Education,* the Constitution forbids racial discrimination in education. And this is the point which I would like the witnesses to address themselves to. Whether this is not an attempt on the part of the executive branch encouraging or requesting the legislative branch to override that decision of the Supreme Court. That the Executive has determined that there needs to be statutory law and asking the Congress to pass such a statute even in the face of a determination by that branch of Government, which is authorized, which is vested with the right to make such a determination—that is, the interpretation of the Constitution—and which have, in fact, determined that the Constitution forbids racial discrimination in education.

Now I would like the witnesses to address your views to that point. Thank you.

The CHAIRMAN. Senator Danforth.

Senator DANFORTH. No.

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. Thank you, Mr. Chairman. With your indulgence, I am going to take this a bit longer than might ordinarily be the case to speak at this point.

I believe I have something by way of background that would be useful to the committee to be considered. It happens that I was counselor to the President at the time the decision was made by the IRS, Mr. Randolph Driller, that segregated schools would no longer receive tax exemption under 501(c)3. That is, racially segregated schools. This statement was made on July 10, 1970. And issued simultaneously with a statement from the White House that the President supported and concurred. And there was a specific context in which this took place.

The *Brown* v. *Board of Education* decision of the Supreme Court had been in effect for 15 years. And had had, however, almost no consequences in the Deep South. The all deliberate speed, which, incidentally was a phrase of President Eisenhower, had not occurred. And a constitutional crisis was emerging. The Court had ordered a clear action to take place with all deliberate speed and it had not been done. And the President determined that in the summer of 1970, that arrangements would be made such that when in August 1970, the schools opened the dual school system would have disappeared.

Now a very careful set of plans and activities followed. A biracial committee was established in each State. Those committees came to Washington. They met in the Roosevelt Room. They were met by Postmaster General Blunt with the deepest Georgian accent that man could have welcoming them. Mr. Schultz, George Schultz, presided over the meeting. Plans were made. And then a visit to the Oval Office. Golf balls and cuff links were dispensed along with a sense that we are going to do this.

A law passed the Congress that provided extra funds to school districts for their expenses in bringing themselves together. Finally, a great meeting was held in New Orleans which the President of the United States flew down and said now we are going to do

this. And they did it. It happened in August 1970. At long last, Brown was obeyed.

Now simultaneous as the U.S. Government and the executive branch moved to carry out an instruction of the Supreme Court as to the Constitution and law, and bring together a dual school system into one, there arose the prospect that another dual school system would spring up through the establishment of segregation academies as private institutions, but, in fact, the public equivalence of the segregated public schools that had previously existed. And, indeed, there was already in Mississippi such a movement. There was movement everywhere, many places. But there was a specific case in Mississippi. And so in order that the elimination of the dual school system should be affected and not simply substituting one dual system for another, this decision was made that Mr. Driller announced on July 10.

Now, sir, two things. It is clear that this administration had no doubt as to the correctness and the legality of that decision up until the middle of December of last year. On December 15, the Deputy Attorney General, Mr. Edward C. Schmults, who honors us with his company here today—a distinguished attorney and a man for whom I have the greatest personal regard—wrote to Congressman Lott—as in Lott-wife—and said:

> When the status of private schools came into question around 1970, Commissioner of Internal Revenue, Randolph Driller, after extensive study of the relevant statutory and constitutional provisions, announced the position of the Internal Revenue Service, thereafter set forth in Revenue Ruling 71447. That position has been maintained by each of Commissioner Driller's successors. It has been approved by two U.S. Courts of Appeal in three separate law suits. The Department has been unable to conclude that the abandonment of the legal position and defense of the Commission's regulation in *Bob Jones* and *Goldsboro* would be expedient.

Mr. Chairman, I won't go on. But there is a file, which I believe you are going to make available, of similar statements. The assertion that no change would be made; suddenly a change was made. A complete reversal. This committee will want to know why.

Finally, Mr. Chairman, can I just say that it is the view of many of us that if you must have legislation every time the Civil Rights Act of 1964 is to be applied, the effect is to repeal the Civil Rights Act of 1964. The decision in 1970 was based upon the Constitution and the Civil Rights Act. And, therefore, there are a number of us who feel that legislation is not—that, indeed, it would set a precedent that would be altogether undesirable.

Senator Hart and Senator Durenberger and I and some 25 other Senators have introduced legislation, sense of a Senate resolution rather. Mr. Hart has a statement he would like to be put in the record at this point that elaborates and expounds our case.

Thank you for your patience, Mr. Chairman.

The CHAIRMAN. Let me say, Senator Moynihan, I appreciate your willingness to cooperate because I know you discussed this matter with the President, I guess in New York, shortly after he made his announcement. And I hope we can come to some agreement in this committee. The longer I look at it, the more remote it seems.

Senator Heinz.

Senator HEINZ. No.

The CHAIRMAN. Senator Wallop.

Senator WALLOP. No.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Just to insert a statement.

The CHAIRMAN. Senator Symms.

Senator SYMMS. I just want to insert a statement, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Byrd, excuse me.

Senator BYRD. I just want to say that I strongly oppose racial discrimination in any form. I think the chairman, who also made that very clear in his opening statement, also brought out that we must be careful that our zeal to eradicate racial discrimination does not result in infringement of religious freedom, an equally strong American democracy. And the chairman went on to say that the majority of private schools in this country have a religious affiliation. Many of these schools sincerely believe that past Internal Revenue Service nondiscrimination policies in enforcement efforts have run roughshod over constitutionally guaranteed religious liberties. I think the chairman was certainly accurate in his assertion in that regard. I think it's important that whatever steps the Government takes that it not be one of harassment against those schools and educational institutions where there is no discrimination. And that's the dilemma that the committee is faced with, and I guess the Government as a whole is faced with. I am glad to note that the chairman plans additional hearings on this matter because I think it is an extremely important one, and one which should be handled in a thorough manner. Thank you.

The CHAIRMAN. Thank you, Senator Byrd. If there are no other statements from any of our colleagues on our committee, we will hear from the witnesses. Do you have some order which you wish to proceed on at first? I might suggest to the committee that perhaps we will wait to direct questions until everyone on the panel has had an opportunity to give their testimony.

STATEMENT OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SCHMULTS. Yes. That's the way we would like to do it if that's all right with the committee.

Mr. Chairman, members of the committee, I am pleased to appear before this committee today to explain the Department of Justice's role in the decision by the administration to change its position in the *Bob Jones University* and *Goldsboro Christian Schools* cases, and to review with you the legal basis for that decision.

With me on the panel to my right is William Bradford Reynolds, the Assistant Attorney General for Civil Rights.

There is, I believe, no issue that deserves more serious attention or requires more thoughtful reflection than the one now being addressed by this committee. The announcement on January 8, 1982, regarding the 11-year practice of the Internal Revenue Service, under section 501(c)(3) of the Internal Revenue Code, has, understandably, evoked nationwide controversy. It has erroneously been perceived by many as a dramatic retreat from the commitment of this administration to pursue an active and vigorous enforcement

policy in the area of civil rights. And, some have characterized the decision as an open endorsement of racial discrimination.

Mr. Chairman and members of this committee, the charge that racial considerations entered the administration's decision concerning the tax-exempt status of private schools is absolutely false. The President's record, both in word and deed, speaks unmistakably and unequivocally to his abhorrence of racial discrimination. In submitting to the President of the Senate and the Speaker of the House of Representatives the tax exemption legislation that this committee will now consider, the President declared:

> I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and our citizens hold dear, and I believe this repugnance should be plainly reflected in our laws.

These words reflected not only the President's sentiments, but those of his administration and of the overwhelming majority of the American people who deplore racial discrimination in any form. The Attorney General emphatically underscored this position just last week in a colloquy with Senator Kennedy during his appearance before the Senate Subcommittee on the Constitution to support the extension of the Voting Rights Act. "I yield to no man," he stated, "in my abhorrence of racial discrimination."

I, too, Mr. Chairman, yield to no man in my intolerance of discrimination, and I know that Mr. Reynolds shares that view. On this point, we are adamant and uncompromising. This administration remains dedicated to continuing the hard-fought battle to eradicate racial discrimination from our Nation.

This committee has inquired as to how the Department of Justice, as part of an administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race. The answer, Mr. Chairman, is that we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.

While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the precise legal issue was before the United States Supreme Court in the *Bob Jones University* and *Goldsboro* cases. Thus, at least four members of the Court considered the question sufficiently unsettled to warrant Supreme Court review.

I am here today to explain the reasons for the Department's advice to the Treasury regarding the authority of the Internal Revenue Service, and to describe the legal deliberations that antedated that advice. While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and Federal law.

A recitation of the events that culminated in the Department's conclusion that the Internal Revenue Service lacks authority to employ Federal public policy to deny tax-exempt status to nonprofit private schools is necessary to appreciate fully the decision that was made.

In February 1981, a panel of the Fourth Circuit Court of Appeals in *Bob Jones University* v. *United States* ruled by a 2-to-1 vote that the denial of tax exemptions to private schools on public policy grounds is authorized by section 501(c)(3) of the Internal Revenue Code of 1954. That decision was followed by a second panel decision of the fourth circuit, again divided 2 to 1, in *Goldsboro Christian Schools* v. *United States*. The Court in *Goldsboro* "simply affirmed the district court for the reasons advanced in the *Bob Jones University* case." Both schools filed writs of certiorari seeking review of the decisions by the U.S. Supreme Court.

The United States participated in both *Bob Jones* and *Goldsboro* in the fourth circuit, and there argued that the IRS practice was authorized by statute.

In September 1981, officials of the Department of Justice met with officials from the Internal Revenue Service to discuss the Government's response to the pending certiorari petitions. The IRS urged that the United States acquiesce in the petitions because it believed that a definitive Supreme Court ruling was both needed and desirable regarding the authority of the Service to invoke public policy as a basis for denying tax exemptions. The Department of Treasury did not participate in these discussions.

On September 19, 1981, the Department of Justice filed a brief for the United States in the Supreme Court that urged, as the IRS had requested, that the petitions be granted. The brief, following the position that the Government had taken in the court of appeals, stated an intent to support the authority of the IRS to deny tax exemptions to *Bob Jones* and *Goldsboro*, if the cases were heard on the merits.

In October 1981, the Supreme Court granted certiorari in the *Bob Jones* and *Goldsboro* cases. Following the grants of certiorari, the Tax Division of the Department of Justice undertook to prepare a draft brief on the merits for review by the Solicitor General's office. That effort was completed sometime in late November or early December and—as had been the case throughout these litigations in light of the unmistakable civil rights implications involved—copies were distributed to the Civil Rights Division for review and comment.

In early December 1981, Mr. Reynolds, and others in the Department who had reviewed the Tax Division draft, voiced concern to me over the claimed legal basis for the IRS authority to deny tax exemptions to private schools under section 501(c)(3). For Mr. Reynolds, the issue was particularly troublesome. As the chief law enforcement official of the Administration in the area of civil rights, he recognized fully the implications of a determination that the IRS had been acting without sufficient legal basis in this area since 1970. At the same time, he believed that the administration should not take a position in the Supreme Court countenancing unauthorized administrative action, if our legal analysis convinced us that the position of the fourth circuit could not be sustained.

On this point I fully agreed. While the entire focus of media attention on this issue has been in terms of the civil rights implications, which certainly is understandable, there is an equally fundamental consideration that seems to have been largely overlooked. The *Bob Jones* and *Goldsboro* cases raise in the starkest terms an issue that goes to the very heart of our constitutional form of government. Under article I of the Constitution, the legislative powers in this country are vested in the Congress of the United States, not in the judicial or executive branches. It is for the Congress to make national public policy by the enactment of laws, and it is Congress responsibility to devise by law, the sanctions to be imposed on those individuals and institutions in our society who fail to adhere to those laws.

The concern of Mr. Reynolds and others in the Department over the fourth circuit's decisions in these cases—a concern, I must say, that I shared—is that it endorsed an administrative practice and procedure that was not simply lacking in congressional authority, but seemed to be directly contrary to the legislative directive in section 501(c)(3) of the Internal Revenue Code. If that proved in fact to be the case on a comprehensive legal analysis of the statute and its legislative history, the Internal Revenue Service—and not the Congress—was determining, on the basis of national policy, how the taxing laws should be administered and enforced. In the context of a private school practicing racial discrimination, there is no one in this room who would argue with the proposition that such behavior deserves the harshest condemnation. But I also believe that there are few here that would quarrel with the proposition that it is Congress responsibility to declare by law how that condemnation is to be expressed and what sanctions are to be applied.

If that constitutional imperative is ignored in one politically sensitive area, it is difficult, indeed impossible, to see why it should not be ignored elsewhere. Let us assume that the Internal Revenue Service today may, without congressional authorization, determine on the basis of what it genuinely perceives as national policy considerations that tax-exempt status should be denied to private schools that discriminate on grounds of race. Tomorrow, the tax exemption could well be eliminated by the Service, again without any congressional action, for private schools that enroll only males or females. Presumably, hospitals that either do or do not permit abortions would be equally vulnerable to the taxing decisions of the IRS on the basis of its perception of national policy in this area at any given point in time.

That prospect, that is to say, leaving the tax-exempt status of private schools and institutions to the sole discretion of the Internal Revenue Service based on its independent view at the moment of national policy goals, runs counter to our most fundamental principles of democratic government. As the President of the United States made clear throughout his campaign and his first year in office, the laws of this country are to be made by Congress, not by administrative fiat, or by judicial activism.

It is this principle that lies at the core of the legal issue in the *Bob Jones* and *Goldsboro* cases. While it comes to the fore in a context that regrettably has overtones in the civil rights area, which

inevitably ignites passionate debate, that fact should make us more, rather than less, attentive to reaching a proper legal conclusion. As offended as we are by the racially discriminatory practices of *Bob Jones University* and *Goldsboro,* practices that we in no way condone or accept, we cannot allow our strong disagreement with such policies to dissuade us from coming to grips with the hard legal issue that is presented. There is but one thing more important to the civil rights movement in this country than combating racial discrimination. And that is that the combat be waged within the letter and the spirit of the law as determined by Congress, not outside the law or in disregard of the Federal statutes on the books.

In response to these concerns, I convened a meeting on December 8, 1981, with representatives of the Solicitor General's office, the Tax Division, the Civil Rights Division and other lawyers in the Department to discuss the legal position of the United States regarding the authority of the Internal Revenue Service to deny tax exemptions to private schools under section 501(c)(3). Following that meeting, I called the Deputy Secretary of the Treasury and suggested that the Treasury might wish to review the *Bob Jones* and *Goldsboro* cases as they involved significant policy issues.

About 2 weeks later, a draft of a brief on the merits to be filed in the *Bob Jones* and *Goldsboro* cases, prepared by the Solicitor General's office, was delivered to the Treasury Department for its review and comments. Consultations with Treasury and IRS officials regarding the brief were held. As a result of those discussions, it was agreed that further work should be done on the draft brief to state more precisely the legislative basis for the IRS' assertion of authority to deny tax exemptions on public policy grounds when racial discrimination is involved. Our objective at that time was to determine whether a principled argument could be made to support the denial of tax exemptions to private schools engaged in racial discrimination without significant risk of inviting denials of exemptions for a variety of other reasons as exercises of unfettered administrative discretion not authorized by Congress. This effort was undertaken on a coordinated basis by the Tax Division and the Solicitor General's office.

Another draft of the brief was forwarded to the Department of the Treasury on December 29, 1981. After reviewing it, Mr. Reynolds, I and others remained unpersuaded by the legal arguments advanced. It was our opinion that such arguments were not sufficient to justify denial of tax exemptions because of race discrimination without also empowering the Internal Revenue Service to deny exemptions for a host of other social policy reasons. Deputy Secretary McNamar advised me that his independent review of the draft brief resulted in the same reservations.

At that point, I asked the Assistant Attorney General Reynolds to prepare a written analysis of the relevant legal and policy considerations in support of his position. He submitted a lengthy memorandum on the morning of January 6, 1982, copies of which have been provided to the committee, addressing the relevant legal points and concluding that the IRS practice since 1970 was unauthorized under section 501(c)(3). Simultaneously, the Solicitor General's office completed its work on the draft brief arguing the other

side of the issue. The memorandum and draft brief were furnished to the Treasury.

As it became apparent that the analyses undertaken by the Department of Justice and the Department of Treasury might eventuate in the Government's change of legal position in the *Bob Jones* and *Goldsboro* cases, two meetings were held with White House counsel to review this probable development. On December 22, 1981, Department of Treasury officials met with the White House counsel to discuss the policy decision under consideration regarding IRS authority. On December 30, both Justice Department and Treasury officials met with the White House counsel to relate the probable changes in legal and policy positions in *Bob Jones* and *Goldsboro.*

Because both Departments foresaw that heated public criticism and protest might accompany a change of an 11-year litigating and policy position in the pending Supreme Court cases, reviewing them with White House counsel and discussing the legal and policy analyses conducted by the Justice and Treasury Departments was entirely appropriate.

On January 6, 1982, the Attorney General held a 2½-hour meeting during which all the legal arguments for and against the claimed IRS authority were presented by those in the Department who had worked on the issue. That meeting was attended by representatives of the Solicitor General's office and Tax Division, Mr. Reynolds, Mr. Olson, who is the Assistant Attorney General of the Office of Legal Counsel, and members of the Attorney General's staff and my staff. At that meeting, it was determined that the Department of Justice should advise the Department of the Treasury that our legal analysis led us to conclude that the IRS practice lacked statutory authority.

Following receipt of the legal advice of the Department of Justice and the policy recommendations of his officials, the Deputy Secretary of the Treasury decided that the tax exemptions to *Bob Jones University* and *Goldsboro* schools had been wrongfully denied and should be granted.

On January 8, 1982, the Attorney General, Brad Reynolds and I met with Secretary Regan and other Treasury officials to discuss the announcement of the Treasury decision. Later the same day, the Department of Justice, in accordance with that decision, filed a memorandum with the Supreme Court, noting the intent of the Internal Revenue Service to revoke the relevant Revenue Rulings in this area and to grant tax exemptions to *Bob Jones University* and to *Goldsboro,* and urging that their cases be dismissed on the ground of mootness and that the decisions of the Fourth Circuit Court of Appeals be vacated.

On January 12, 1982, the White House announced that it would seek the legislation necessary to empower the Internal Revenue Service to deny tax exemptions to schools that discriminate on account of race. And on January 18, 1982, proposed legislation was submitted to the Congress by the President.

Pursuant to a request by the Treasury Department, on January 29, 1982, we forwarded to Treasury an analysis of legal authorities which I now ask be included in the record of this hearing. This analysis restates the written and oral advice the Justice Depart-

ment gave to the Treasury late in December and the first week of January. We also address in the analysis certain collateral legal questions which arose in the aftermath of the January 8 decision.

The CHAIRMAN. Without objection, that will be included.

[The prepared analysis follows:]

January 29, 1982

ANALYSIS OF LEGAL AUTHORITIES FOR
POSSIBLE INCLUSION IN A BRIEF

QUESTION PRESENTED: Has Congress authorized the Internal Revenue Service's ruling that a private school does not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 if it engages in racially discriminatory practices?

Pending before the Supreme Court on writs of certiorari are Bob Jones University v. United States, No. 81-3, and Goldsboro Christian Schools, Inc. v. United States, No. 81-1, in which petitioners, bona fide religious or educational institutions, challenge decisions of the Fourth Circuit Court of Appeals sustaining the asserted authority of the Commissioner of Internal Revenue to deny petitioners tax-exempt status under Section 501 (c)(3) of the Internal Revenue Code of 1954 because of racially discriminatory practices. The argument that Congress has directed the denial of tax-exempt status to private educational institutions that practice racial discrimination is not persuasively supported by either the language or the legislative history of Section 501(c)(3).

STATUTE INVOLVED

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§501(a) and (c)(3) (1971)) provide in pertinent part:

> Sec. 501. Exemption from tax on corporations, certain trusts, etc.
>
> (a) Exemption from taxation. -- An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> (c) List of exempt organizations. -- The following organizations are referred to in subsection (a):
>
> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bob Jones University - No 81-3

1. Petitioner Bob Jones University ("Bob Jones") is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures . . . ." Bob Jones provides instruction for students from kindergarten through college and graduate school, enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects. All courses are taught in accordance

with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians, and students are examined as to their religious beliefs and their conduct is strictly regulated.

Bob Jones maintains a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. This policy is based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures. Prior to 1971, Bob Jones excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but Bob Jones continued to deny admission to unmarried blacks unless the applicant had been a staff member of Bob Jones for at least four years. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). At that time it was the school's judgment that, while a policy of excluding blacks altogether was not doctrinally required, denying admission to unmarried blacks was the best means of implementing Bob Jones' prohibition against interracial dating and marriage.

In response to decisions of the court of appeals in Bob Jones University v. Johnson, 529 F.2d 514 (4th Cir. 1975), and of the Supreme Court in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), Bob Jones revised its admissions policy to permit unmarried blacks as well as married blacks to matriculate. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage,

and it established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate Bob Jones' rules and prohibitions against interracial dating. The University required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions.

2. Prior to 1970, the Internal Revenue Service recognized Bob Jones as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code") (26 U.S.C. §501(c)(3)). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies, and that it would not continue to treat gifts to such schools as deductible contributions under Section 170. 1/ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230.

1/ The Service's interpretation of Section 501(c)(3) was spurred by litigation. In Green v Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under Section 501(c)(3) to private schools in Mississippi that discriminated against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501 (c)(3), but reversed its legal view before the case was appealed to the Supreme Court. The Court's summary affirmance of Green thus "lacks the precedential weight of a case involving a truly adversary controversy," and leaves open the question of whether a racially discriminatory private school is eligible for tax exemption under Section 501(c)(3). Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

In November 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including Bob Jones, announcing its new policy and requesting proof of non-discriminatory admissions practices. Bob Jones responded that it did not admit black students and, in September, 1971, further stated that it had no intention of altering that policy. The Service therefore commenced administrative proceedings leading to the revocation of Bob Jones' tax exemption and of its advance assurance of deductibility.

In January 1976, after the University's attempt to enjoin the administrative proceedings had failed in the Supreme Court, see Bob Jones University v. Simon, 416 U.S. 735 (1974), the Service issued a final notice of revocation, effective as of December 1, 1970.

3. Seeking to reinstate its previous 28-year exemption, Bob Jones initiated suit in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975. 2/ The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975. Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized

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2/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. §3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

and operated exclusively for religious and educational purposes, and that the University was not required to demonstrate a non-discriminatory racial policy in order to so qualify. 468 F. Supp. 890 (D.S.C. 1978).

The district court explained that Section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over such broad power, the district court observed: "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action--a dilemma of constitutional proportions. Citizens could no longer rely on the law of §501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny." Id. at 905.

By a 2-1 margin, the Fourth Circuit Court of Appeals reversed the district court's holding that Bob Jones was entitled to tax-exempt status because it is a religious institution and qualifies under the enumerated "religious" and "educational" categories of Section 501(c)(3). Bob Jones University v. United States, 639 F.2d 147 (1980). Relying on the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997

(1971), the majority agreed with the Internal Revenue Service that Section 501(c)(3) must be interpreted as incorporating the common law of charitable trusts as a gloss on each of the separately enumerated exemptive purposes in the statute. The panel majority further agreed with the Green conclusion (330 F. Supp. at 1156-60) that to be eligible for tax-exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy." Id. at 151.

The majority also relied on a 1939 House Report explaining the theory animating Congress to confer tax exemptions on organizations devoted to charitable and other purposes to buttress the conclusion that Section 501(c)(3) establishes a public policy test:

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939). Because Bob Jones' discriminatory practices violated clearly defined public policy, rooted in the Constitution, federal prohibitions against federal assistance to racially discriminatory schools, and a federal statute, 42 U.S.C. § 1981, proscribing private acts of racial discrimination, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status. . . ." Id. at 152.

In so doing, the majority rejected Bob Jones' argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit Bob Jones from adhering to its teachings nor force any individual student to violate his beliefs. With respect to Bob Jones' Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." Id. at 155 (emphasis in original).

Judge Widener dissented, concluding that "Bob Jones University is a religious organization" within the meaning of Section 501(c)(3), and that the majority, the Service, and the district court in Green v. Connally, supra, had misconstrued Section 501 (c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt must also be "charitable" organizations under the common law of charitable trusts Id. at 156. Section 501(c)(3), Judge Widener observed, grants tax-exempt status to each class of organization enumerated in the statute, and because Bob Jones falls within one of those classes ("religious"), the IRS lacked authority to deny the exemption granted by Congress. Id. at 158. Judge Widener further asserted that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private, non-tax-funded religious institutions.

B. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. ("Goldsboro"), is a North Carolina nonprofit organization incorporated in 1963 "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *." At least since 1969, Goldsboro has maintained a regularly enrolled student body (750 students in 1973-74) for kindergarten and grades one through twelve, and has satisfied the requirements of North Carolina for secular education in private schools. Submissions to the State indicate that Goldsboro requires its high school students to take one Bible-related course during each semester. In keeping with Goldsboro's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, Goldsboro's practice is to begin each class with a prayer.

Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God."

2. Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that Goldsboro did not

qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code and, in 1974, assessed FICA and FUTA taxes against it.

3. After making partial payment, Goldsboro instituted suit in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 of withheld federal social security and unemployment taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period. On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied Goldsboro tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because its racially discriminatory admissions policy violated the declared public policy of the United States. By a 2-1 margin, the Fourth Circuit Court of Appeals affirmed. Finding the case "identical" to the Bob Jones University case, the court of appeals majority upheld the denial on the authority of Bob Jones University. See Goldsboro Christian Schools, Inc. v. United States, No. 80-1473 (4th Cir., Feb. 24, 1980). Judge Field dissented for the reasons stated by Judge Widener in his dissenting opinion in Bob Jones University.

DISCUSSION

The central legal question presented by these cases is whether Congress authorized the IRS to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that discriminate on the basis of race. Subsidiary legal questions are whether, in the event that no such authority exists in the statute, Section 501(c)(3) tax exemptions provided to educational institutions that practice racial discrimination violate either the Constitution or Title VI of the 1964 Civil Rights Act. A review of the objective evidence of legislative intent leads to the conclusion that Congress did not authorize the IRS to deny tax-exempt status in the circumstances described. Nor can we find any support in the Constitution or Title VI of the 1964 Civil Rights Act for withholding tax exemptions to private educational institutions that discriminate on the basis of race.

A. Statutory Language

The search for congressional intent must, of course, begin with the words of the statute to be construed. See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, ___ U.S. ___, 101 S.Ct. 1571, 1580 (1981); United States v. Oregon, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis supplied). In order to construe this language to require a denial of tax-exempt status to educational institutions

such as Bob Jones and Goldsboro, one must conclude (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable" and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common law sense--that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy. See Green v. Connally, supra, 330 F.Supp. at 1157. Neither conclusion is permissible.

By its very terms, the statutory enumeration of eight purposes or functions entitling nonprofit corporations to tax-exempt treatment is framed in the disjunctive by use of the connector "or." As a consequence, Congress manifested an intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). The distinct references in Section 501(c)(3) to "educational" or "charitable" organizations confirms "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." Prince Edward School Foundation v. United States, __ __U.S. __ __, 101 S.Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

This interpretation of the language of Section 501(c)(3) assigns to the words used by Congress their ordinary meaning. It is reinforced by the settled canon of statutory construction requiring that related statutory provisions be interpreted in para materia. 2A Sutherland, Statutory Construction, §46.05 at 56-57 (4th ed. 1973). Sections 503, 504, and 513 of the Code, sister provisions of Section 501(c)(3), reiterate the separate and disjunctive purposes or functions described in Section 501 (c)(3), thereby suggesting that each enumerated category provides an independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. §§ 503(b)(3), 504(a)(1) & (3), and 513(a). Prior to 1969, Section 503 denied tax-exempt status to organizations otherwise qualified under Section 501(c)(3) if they engaged in certain prohibited transactions. 3/ Section 503(b) provided, in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) . . . except --
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> (1) a religious organization . . .;
>
> (2) an educational organization . . .;
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> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; . . . [emphasis supplied]

3/ References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

The language underscored above, which also appeared in the pre-1969 version of Section 504(a)(1) and (3) 4/ and appears in the current version of Section 513(a), 5/ substantiates Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501, and (2) that each purpose or function constitutes a sufficient and independent basis for exemption under Section 501(a).

Regulations promulgated by the Internal Revenue Service also reflect an interpretation of the statutory language as

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4/ Section 504(a)(1) and (3) provided for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> unreasonable in amount or duration in order to carry out the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3); or . . . (3) invested in such a manner as to jeopardize the carrying out of the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3).

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code. This Section 504 was repealed by Congress in 1969. P.L. 91-172, §101(j)(15).

5/ Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511 (which imposes a tax on unrelated business income of otherwise tax-exempt organizations) means "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under Section 501 (or, . . . to the exercise or performance of any purpose or function described in Section 501(c)(3)), . . ." Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

affording tax-exempt status to any organization qualifying under one of the categories enumerated in Section 501(c)(3), without regard to whether it also accords with the characteristics of a common law charity. Under Section 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for one or more of the following purposes: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. §1.501 (c)(3)-1(d)(1)(i) (emphasis supplied). The regulations state further that

> since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . . . For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it is "charitable".

26 C.F.R. §1.501(c)(3)-1(d)(1)(iii) (emphasis supplied).

Nonetheless, the Fourth Circuit Court of Appeals read Section 501(c)(3) to provide tax-exempt status only to institutions that are organized and operated for one of the designated purposes and are also qualified as a common law charity. In support of this interpretation of Section 501(c)(3), the court cited Section 170 of the Code, which it asserted, "places the separately enumerated purposes in [§ 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." 639 F.2d at 151 n.6.

Congress, however, has directed that caption headings in the Code be ignored in construing tax provisions. See 26 U.S.C. §7806(b). In addition, the terms of Section 170 contradict the court's construction of Section 501(c)(3).

Subsection (c) of Section 170 defines "charitable contributions" in relevant part as follows:

> (c) Charitable contribution defined. -- For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of --
>
> (2) A corporation, trust, or community chest, fund, or foundation --
>
> (B) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . or for the prevention of cruelty to children or animals; . . .

26 U.S.C. §170 (1971) (emphasis supplied). The definition of the term "charitable contribution" relates solely to Section 170, and it is defined partly in terms of the purposes for which certain organizations are organized and created, namely, "religious, charitable, scientific, literary, or educational [or specified other] purposes." These distinct purposes each qualify an organization to receive "charitable contributions." Section 170 thus provides no support for an interpretation of Section 501 (c)(3) that requires every institution qualifying for receipt of a "charitable contribution" to operate as a common law charity. 6/

6/ Moreover, if all organizations which receive "charitable contributions" were required to conform to common law notions of charity, the requirement of Section 170(c)(2)(C) that no part of the earnings of an organization which receives "charitable contributions" may "inure [] to the benefit of any private shareholder or individual," would be superfluous. See p. 2, supra.

Thus, the statutory language of Section 501)(c)(3) and its sister provisions, the structure of the Code, and the Service's interpretive regulations require the conclusion that Congress intended to afford tax-exempt status to any organization organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

There is yet another reason that compels this conclusion. Even if one assumes that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus betray a fundamental axiom of statutory construction: statutes are to be construed to give effect to each word, and no one part of a statute should be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

The Service followed this axiom during the initial period of Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than its common law sense. In 1923, the Service stated in I.T. 1800, II-2 C.B. 152, 153, that the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 (Section 501(c)(3)'s predecessor) means "relief of the poor": 7/

> It will be seen that "charitable" in this broad sense includes, among other things, education, religion, relief of the poor, social service, and civil or public benefactions. On the other hand, "charitable" in its popular and ordinary sense pertains to the relief of the poor. . . .
>
> In Section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational. . . . It seems obvious that the intent must have been to use the word "charitable" in Section 231(6) in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civil, or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable

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7/ That the Service promulgated this interpretive regulation temporally near to the initial enactment of the early revenue statutes entitles it to special deference. An agency's interpretive regulation is due particular respect when it reflects a contemporaneous statutory construction. Power Reactor Development Company v. Electricians, 367 U.S. 396, 408 (1961). See NLRB v. Boeing Company, 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference . . . "). See also discussion in text at pp. 26-27, infra.

scientific, literary, or educational . . . ." (Emphasis supplied). 8/

Based on the foregoing, the conclusion compelled by the language of the statute is inescapable: Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational." The contrary reading of the legislation by the Fourth Circuit is plainly incorrect.

This does not suggest in any way a disagreement with the court's underlying premise that the practice of racial discrimination by an institution deserves the harshest condemnation. In seeking, however, to achieve justifiable and laudatory ends, it is crucial that the government not employ means that trench upon fundamental principles firmly embedded in the Constitution that divides national power among three distinct branches of government. The Constitution assigns legislative power to the Congress, and neither the courts nor administrative agencies have "the

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8/ The uncertainty that would be generated in the tax law by granting exemptions to any entity organized "for purposes beneficial to the community," Commissioners of Income Tax v. Pemsel, supra, may explain why Congress chose to enumerate specifically certain types of organizations deemed worthy of tax exemption without regard to whether they qualified as common law charities. To do otherwise would have exposed organizations otherwise qualifying for tax-exempt status under Section 501(c)(3) to unforeseeable changes in public mores or values. For example, in 1844, Justice Story suggested that a school organized to teach Judaism cannot be considered charitable. Vidal v. Girard Ex'rs, 43 U.S. (2 How.) 127, 198-201 (1844); see Neuberger & Crumpler, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979).

power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning and effect to statutes as passed by Congress." National Life and Accident Ins. Co. v. United States, 524 F.2d 559, 560 (6th Cir. 1975).

B. Legislative History

Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, see, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976); United States v. Oregon, 366 U.S. 643, 648 (1961), a review of that history does not warrant the construction of Section 501(c)(3) endorsed by the Commissioner and the Fourth Circuit Court of Appeals in Bob Jones University.

The exemptions from taxation now contained in Section 501 (c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556, 9/ which provided in pertinent part: [N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes." There is no indication in the legislative history that Congress incorporated or had reference to the "common law of charitable trusts" in enacting this taxing statute.

9/ This corporate income tax act was later declared unconstitutional by the Supreme Court in Pollock v. Farmer's Loan & Trust Company, 158 U.S. 601 (1895).

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II(G)(A) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

This legislation broadened the 1894 exemption to include "scientific" corporations, and added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, however, income of a charity could not inure to the benefit of a private person. See 4A Scott, The Law of Trusts § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute would have been unnecessary if Congress had intended to condition tax exemption on satisfying the requirements of a common law charity.

The conclusion that Congress did not intend to incorporate the common law of charitable trusts into the exemption is further supported by the Service's contemporaneous construction of the early revenue acts. In a ruling issued in 1921, the Service stated that charitable trusts were not exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This position was also advanced in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common law sense. Moreover, as previously discussed, supra at 16-19, in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932, 10/ and regulations issued by the Service under those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (Revenue Act of 1924). "Corporations organized and operated exclusively for

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10/ Revenue Act of 1924, ch 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

charitable purposes comprise, in general, organizations for the relief of the poor." 11/

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement would have been unnecessary if Congress had intended for all organizations to qualify as common law charities in order to be exempt from taxation. See 4A Scott, The Law of Trusts § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447, also carried forward the same exemption, and the regulations promulgated under these Acts continued to define the term "charitable" as "relief of the poor." See Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

11/ Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

In the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the fifteen years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" to mean relief of poverty. See Treas. Reg. 103, §19.101(6)-1 (1939 Code); Treas. Reg. 111, §29.101 (6)-1 (1939 Code); Treas. Reg. 118, §39.101(6)-1(b) (1939 Code). 12/

Section 501(c)(3) of the 1954 Code, ch. 591, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety."

12/ The House Report to the 1939 Act explained that the theory for granting tax exemptions by Congress to charitable and other qualifying organizations was in recognition of their performance of functions that promote the general welfare and that might otherwise be paid by the government. Contrary to the Fourth Circuit's suggestion in Bob Jones University, supra, 639 F.2d at 151, the Report does not indicate that Congress intended to endow the IRS with authority to disqualify a designated organization from tax-exempt status upon an agency determination that one or more of the organization's practices affronted an IRS concept of federal public policy as informed by the "general welfare." To the contrary, Congress made a determination that organizations within the terms of Section 501(c)(3) advanced the general welfare, and did not give the IRS authority to determine on a case-by-case basis whether particular practices of a qualifying organization sufficiently subtracted from the general welfare to warrant denial of a tax exemption.

In addition, Congress tightened the restrictions on political activities of tax-exempt organizations. 13/

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from Sections 101 and 421 of the 1939 Code. No change in substance has been made except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis supplied).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor." In Section 1.501(c)(3)-1(d)(2) of its 1959 regulations, the Service concluded:

> The term "charitable" is used in Section 501 (c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. . . .

13/ The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Obviously, the purpose of this regulation is to clarify that the meaning of "charitable" is not "limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant in the statute. The regulation does not suggest organizations devoted to other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also serve "charitable" purposes. Indeed, the same regulation defines "educational" without any reference to the notion of charity:

> The term "educational", as used in Section 501(c)(3), relates to --
>
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

26 C.F.R. § 1.501(c)(3)-1(d)(3) (1959). 14/

14/ To the extent that the Service's regulations can be interpreted to require "educational" organizations to also satisfy the requirements of "charitable" organizations, they are inconsistent with the plain language of Section 501(c)(3) and are suspect. The Supreme Court outlined the limits of the Executive's interpretive powers in Manhattan General Equipment Company v. Commissioner, 297 U.S. 129, 130 (1935):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Under the Service's interpretive regulations, private schools plainly qualify as "educational" institutions entitled to tax-exempt status under Section 501(c)(3), notwithstanding any racially discriminatory practices.

Since 1894, Congress has consistently and repeatedly manifested an intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. The action of Congress is inconsistent with an intent to deny tax-exempt status to an otherwise qualified "educational" organization simply because it does not also qualify as a common law "charitable" organization.

Significantly, the Commissioner of Internal Revenue did not read Section 501(c)(3) and its predecessors any differently until 1970--some 70 years after Congress' initial enactment of the relevant statutory language. To the contrary, prior to its sudden reversal of position in the middle of the Green litigation, the government had steadfastly maintained the position demanded by the unambiguous language of Section 501(c)(3), its legislative history, and the Service's own interpretative regulations. So belated an administrative reversal of position provides no legal basis for ascribing to a much earlier Congress an intent at odds with the very words used by Congress. 15/ Here, the original legislative intent

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15/ Obviously, the Commissioner's 1970 revenue ruling is not even arguably a contemporaneous construction of the statute by those presumed to be aware of congressional intent " National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979).

is clear, and it must prevail until amended or altered by explicit congressional action.

C. Congressional Action Subsequent to 1970

It is arguably appropriate to examine Congressional action subsequent to the Commissioner's 1970 change of position on the tax exemption question, and the decision in Green v. Connally, supra, in order to determine whether there is a basis to conclude that Congress has in more recent years authorized the IRS to deny tax-exempt status to educational institutions that practice racial discrimination. 16/ Such an examination reveals no legitimate basis for reaching such a conclusion.

To start with, it is well settled that the intent of a subsequent Congress has little bearing on the interpretation of a statute enacted years earlier. "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" Rainwater v. United States, 356 U.S. 590, 593; United States v. Price, 361 U.S. 304, 313 (1960); Haynes v. United States, 390 U.S.

16/ In this instance, because the language of the statute is clear and unambiguous, a strong argument can be made that resort to legislative history, either before or after enactment of Section 501(c)(3), is inappropriate. See Ernst & Ernst v. Hochfelder, supra; Packard Motor Co. v. NLRB, 330 U.S. 485, 492 (1947) ("There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law.").

85, 87 n.4. (1968); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968). This point was underscored by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), in the following terms:

> The views expressed by particular legislators as to the meaning of that language in [the statute being construed] "cannot serve to change the legislative intent of Congress . . . 'since the statements were [made] after passage of the [Clayton] Act.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), quoting National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 639 n.34 (1967).

Thus, in Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), the Court rejected the argument that a committee report written eleven years after a statute was passed should be considered in construing the statute. The Court there stated (Id. at 758):

> "It is the intent of the Congress that enacted [the section] . . . that controls." Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence that Congress intended [the statute to be interpreted as the Court held].

Accord, Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980).

Similarly, evidence of congressional inaction has been accorded no weight by the courts in the effort to illuminate the intent of an earlier Congress. As noted in United States v. Wise, 370 U.S. 405, 411 (1962):

> [S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.

Accord, Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965) ("the abortive action of the subsequent Congress [in considering a 'clarifying' amendment] 'would not supplant the contemporaneous intent of the Congress which enacted the . . . Act'").

Since 1970, several bills have been introduced in Congress, seeking in a variety of ways to legislate with regard to tax-exempt status of private schools practicing racial discrimination. 17/

17/ These bills fall into several categories. (a) Bills providing that private schools shall not be denied tax exemptions on account of their admissions policies or the composition of the student body or faculty. (H.R. 68, 92d Cong., 1st Sess. (January 22, 1971) (Congressman Abernethy); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971) (Congressman Nichols); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971) (Congressman Edwards); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973) (Congressman Edwards)). (b) Bills providing that tax exemptions and the deductibility of contributions to tax-exempt organizations shall not be construed as the provision of Federal assistance. (H.R. 1002, 96th Cong., 1st Sess. (January 18, 1979) (Congressman Dornan); S. 449, 96th Cong., 1st Sess. (February 22, 1979) (Senator Hatch); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981) (Congressman Dornan)). (c) Bills providing that the IRS may not terminate the exempt status of an educational organization for reasons of racial discrimination unless the organization is adjudicated as racially discriminatory in a court. (H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979) (Congressman Ashbrook); H.R. 95, 97th Cong., 1st Sess.) (January 5, 1981) (Congressman Ashbrook); H.R. 332, 97th Cong., 1st Sess.) (January 5, 1981) (Congressman Holt); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981) (Congressman Chappell)). (d) Bill providing a declaratory judgment procedure for denying tax-exempt status to private schools on the basis of racial discrimination. (S. 995, 96th Cong., 1st Sess. (April 24, 1979) (Senators Helms, Ford, Schweiker, Stevens, and Zorinsky)). (e) Bill to prevent the IRS from implementing proposed rules relating to determination of whether private schools have discriminatory policies. (S. 103, 96th Cong., 1st Sess. (January 18, 1979) (Senators Schmitt, Laxalt, Nunn, Schweiker, Goldwater, Stevens, Zorinsky, Hayakawa, Thurmond, Helms, Cochran, Tower, Warner, McClure, and Hatch)).

None of these bills ever was voted upon on the floor of either House of Congress.

Because none of the bills was enacted as law, they remain wholly irrelevant to the central question of congressional authorization of the activity in question. United States v. Wise, supra. 18/

18/ The Supreme Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), does not suggest otherwise. That case construed 42 U.S.C. § 1981 to apply to private acts of racial discrimination, and based that interpretation on an earlier Court decision, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Subsequent to the Jones decision, Congress considered and rejected an amendment to the Equal Employment Opportunity Act of 1970 which would have repealed the statutory interpretation used by the Court in Jones insofar as it gave private sector employees a right of action based on racial discrimination in employment. The Runyon Court concluded from this that the theory which supported its interpretation of Section 1981 had been challenged unsuccessfully in Congress. The Court thus presumed "congressional agreement with the view that § 1981 does reach private acts of racial discrimination." Id. at 175 (emphasis in original). The extent to which the Runyon Court relied upon this congressional inaction in deciding the case is unclear. Presumably the Court did not give that factor much weight since "unsuccessful attempts at legislation are not the best of guides to legislative intent." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 n.11 (1969); see also United States v. Wise, 370 U.S. at 411; Waterman Steamship Corp. v. United States, 381 U.S. at 269. In any event, Runyon is distinguishable from the situation with regard to Section 501(c)(3) because no legislation which would have disapproved of or overruled the interpretation given to Section 501(c)(3) by the Green court and by the IRS in 1970 has ever been considered on the floor of either House of Congress.

The inquiry into Congressional authorization focuses on later legislation that is actually enacted by Congress. In what is generally regarded as the leading case in this area, the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), held that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Id. at 380-81 (emphasis supplied). In that case, a 1959 amendment to the 1927 Communications Act defined the general term "public interest" as used in the original statute. The Court found that the subsequent legislative language "makes it very plain that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues." Id. at 380.

Here, no such subsequent legislation exists. Congress has not altered, amended or in any respect modified the pertinent language of Section 501(c)(3) since it was enacted in 1954. Nor can it reasonably be argued that enactment by Congress in 1976 of Section 501(i) to the Internal Revenue Code, or its adoption in 1978 of the Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980 (the "1980 Appropriations Act"), compels a contrary conclusion.

1. Section 501(i).

In 1976, Congress added to the Internal Revenue Code a provision, now contained in Section 501(i), which denies tax exempt status to a social club if its charter or any of its written policy statements provide for "discrimination against any person on the basis of race, color, or religion." Pub. L. No. 94-658, § 2(a), 10 Stat. 2697.

The Reports of both the House and Senate regarding that proposed law state that the Internal Revenue Code does not explicitly deal with the question whether an income tax exemption for social clubs "is incompatible with discrimination on account of race, color, or religion." H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 (1976); S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7 (1976). The Reports also note that a three-judge district court had held that providing tax exemptions to social clubs which discriminate on account of race does not violate the Constitution. Id. See McGlotten v. Connally, 338 F. Supp. 448, 457-59 (D. D.C. 1972) (Bazelon, J.).

Having set forth the state of the law with regard to racially discriminatory private clubs, the Reports cite the "reasons for change" in the law as follows:

> [I]t is inappropriate for a social club or similar organization described in section 501(c)(7) to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion.

H.R. Rep., supra at 8; S. Rep., supra at 8. Thus the "reasons for change" cited by the Congress were specific to social clubs and to Section 501(c)(7). There is nothing to suggest the purpose was to place the same restrictions on social clubs as the IRS had placed on educational organizations.

In a footnote to the "Present law" section of both congressional reports on this bill is a reference to the fact that McGlotten also held that the Code's scheme of exemption for fraternal orders amounts to "state action" rendering the Code's "aid" to racially discriminatory fraternal orders unconstitutional. 338 F. Supp. at 459. 19/ The footnote continues:

> Also, the Supreme Court has affirmed (Coit v. Green, 404 U.S. 997 (1971)) a decision (Green v. Connally, 330 F. Supp. 1150 (D.C., D.C. 1971)) that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2)).

19/ The McGlotten court further held that a proper interpretation of the charitable deduction subsection relating to fraternal orders precludes allowance of deductions for gifts to racially discriminatory fraternal orders. 338 F. Supp. at 459-60.

H.R. Rep. at 8; S. Rep. at 8. The language of this footnote citation in no way indicates approval of or acquiescence in existing case law, but only acknowledgement, and it is the only mention of Section 501(c)(3) organizations in any part of the statute and legislative history. Moreover, the footnote is incorrect in one significant respect: it omits the fact that the Supreme Court had by that time indicated in Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974), that the summary affirmance of Coit v. Green, supra, lacked precedential weight because it was not a truly adversarial appeal, and thus the question of whether a discriminating school could obtain tax-exempt status remained open (see n.1, supra). 20/

20/ That this singular footnote reference to Green in the committee reports cannot be read as an authoritative expression of congressional will was made clear by the Supreme Court in Consumer Product Safety Commission v. GTE Sylvania, supra. There, the Court gave no weight to statements contained in a conference committee report because the legislation which was the subject of the report did not deal with the issue discussed in the statements in question, because the interpretation espoused by the conferees was not mentioned by the committee which drafted the amending act, and because the interpretation espoused in the report was not debated on the floor of Congress. Similarly, in the committee reports relating to the 1976 amendment to the Code, the amending legislation did not purport to interpret Section 501(c)(3) and, indeed, concerned Section 501(c)(3) organizations only, the Senate and House Reports use virtually identical language, which suggests the absence of independent consideration of the proper scope of Section 501(c)(3), and the interpretation suggested by the reports was not debated on the floor of Congress. Thus the conclusion of the Court in GTE Sylvania applies equally here: "the statement of the Conference Committee is far from authoritative as an expression of congressional will. . . ." 447 U.S. at 120.

In floor debate on the legislation there was no indication that Congress intended to approve of the 1970 IRS policy or that the bill derived from that ruling. Congressmen Ullman and Frenzel, who spoke in support of the bill, explained the nondiscrimination provision with regard to social clubs as "a new requirement" and a "major change in the tax law . . . with regard to social organizations." 122 Cong. Rec. H27452 (daily ed. Aug. 24, 1976). Neither gentleman made any reference to IRS policy with regard to Section 501(c)(3) organizations.

The statute as it was considered in committee made changes in the revenue laws only with regard to Section 501(c)(7) organizations (social clubs and similar groups). It amended Code provisions dealing only with the tax status of such organizations. On the Senate floor an amendment was added concerning tax carryovers and the commissioning of a study of tax incentives for recycling. Thus, the focus of the legislation and of the legislators was the taxation of social clubs, not amendment of the tax laws regarding exempt organizations generally. That legislation provides no guidance as to the intended interpretation of Section 501(c)(3) or as to the meaning of the terms "charitable," educational" or "religious" as used in that Code provision.

2. Ashbrook and Dornan Amendments

In 1978 and 1979, the IRS sought to supplement its procedures for verifying whether the actual practices of private schools conformed to the schools' announced policies of nondiscrimination. 43 Fed. Reg. 37296-98, Aug. 22, 1978; 44 Fed. REg. 9451-55, Feb. 9, 1979. The controversial nature of those proposals prompted congressional hearings. Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess. (1979). While some of the witnesses testifying at those hearings assumed that Section 501(c)(3) authorized the IRS to deny tax exemptions to private schools with racially discriminatory policies, see, e.g., id. at 1176, (statement of James P. Turner, Deputy Assistant Attorney General, Civil Rights Division), other witnesses indicated that they did not believe the IRS had that power, see e.g., id. at 586 (statement of Hon. Strom Thurmond).

Congress responded to the controversy over the proposed revenue procedures by acting to prevent the IRS from enforcing its proposed regulations and from devising any additional procedures for enforcing its policy of denying tax-exempt status to racially discriminatory private schools. The Dornan Amendment, Section 615 of the 1980 Appropriations Act, Pub. L. No. 96-74, 93 Stat. 559, 577, provided that the funds made available by the Act could not be used to carry out the 1978 and 1979 proposed revenue procedures. The Ashbrook Amendment,

Section 103 of the 1980 Appropriations Act, 93 Stat. at 562, specified that the funds appropriated could not be used "to formulate to carry out any . . . procedure, guideline . . . or measure which would cause the loss of tax-exempt status to private, religous, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

It is important to emphasize that the Ashbrook and Dornan Amendments were additions to an appropriations bill. The House Report on the 1980 Appropriations Act includes a reminder that the rules of the House specifically prohibit appropriations acts from including language which is legislative in nature. H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 4 (1979). The Report also states that "inclusion of such items in an appropriation act does not set a precedent and confers no subsequent legislative authority for such appropriations." Id.

The House Report on the 1980 Appropriations Act summarizes the Committee's misgivings concerning the proposed 1978 and 1979 revenue procedures:

> On August 22, 1978, and on February 9, 1979, the Internal Revenue Service issued proposed revenue procedure [sic] relating to the tax exempt status of private schools. At present the legislative oversight committees of both the House and Senate are considering these proposals. This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal

> Revenue Service revenue procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of schools is a matter of far-reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit. The Appropriations Committee is unsure that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.

Id. at 14-15 (emphasis supplied). Thus, the Committee Report eschews any definitive conclusion with regard to IRS authority, stating that the Committee is "unsure" whether the 1978 and 1979 procedures accord with legislative intent. Moreover, the Report counsels that action be taken by the Service in the area of tax exemptions for private schools "only when the legislative intent is fairly explicit." This explanatory passage cannot be construed as indicating approval of existing IRS policy with regard to private schools.

The Ashbrook and Dornan Amendments on their face do not affect the then-existing nondiscrimination policies of the Service. See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587. Statements by the sponsors of the Amendments confirm this limitation on the scope of the appropriations bill. 21/ These statements, recognizing the extent of the Amendments' temporal reach, do not sanction or

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21/ See Appendix A, infra.

approve the pre-August, 1978 IRS policies. They do no more than recognize the existing IRS revenue rulings and procedures and the obvious fact that the Amendments would not affect them. Indeed, the sponsors of the amendments indicated that they did not believe the IRS had authority to deny tax exemptions to racially discriminatory schools. 22/ Moreover, the Amendments were not intended to be Congress' final statement on the issue of tax exemptions for racially discriminatory schools. The sponsors stated that these appropriations limitations were intended to allow Congress time to act in the area. 23/

Statements in the course of legislative debate by individual legislators who are not sponsors of the legislation or responsible for its drafting generally are entitled to little weight in searching for the intent of the entire legislative body. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976); NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964). In any event, no conclusive legislative view of the 1970 IRS policy can be discerned from the debate on the Ashbrook and Dornan Amendments. Some legislators expressed the view that the IRS did not have authority to deny tax exemptions to racially discriminatory schools, while others expressed the opposite view. 24/

22/ See Appendix B, infra.

23/ See Appendix C, infra.

24/ See Appendix D, infra.

The Ashbrook and Dornan Amendments have been extended in subsequent fiscal years. In the Appropriations Act for fiscal 1982 the Ashbrook Amendment was extended with the addition of language which prohibits use of appropriations to "carry out any . . . court order . . . which would cause the loss of tax-exempt status . . . unless in effect prior to August 22, 1978." 25/

Statements of Congressmen Ashbrook and Dornan in support of extending their respective Amendments again acknowledged that the Amendments only alter IRS procedures implemented subsequent to August, 1978. 26/ Also in these debates, Congressman Ashbrook indicated very clearly that in his opinion the IRS does not

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25/ The Ashbrook Amendment passed the House on July 30, 1981. See 127 Cong. Rec. H5398 (daily ed., July 30, 1981). It was approved by the Senate Committee on Appropriations on September 15, 1981. See 127 Cong. Rec. D1057 (daily ed., Sept. 15, 1981). Although the House bill has not yet been enacted, it was temporarily effective from October 1, 1981, until November 20, 1981, pursuant to Pub. L. No. 95-51, the continuing Appropriations Act. That Act was extended, by amendment, to December 15, 1981. See Pub. L. No. 97-85. On December 15, a joint resolution further extending these conditions for fiscal year 1982 became law. See Pub. L. No. 97-92.

26/ See Appendix E, infra.

have authority to deny tax exemptions to racially discriminatory private schools. 27/

In passing the Ashbrook and Dornan Amendments, Congress called a halt to the effort of the IRS to establish stricter and more detailed procedures for implementing its 1970 policy of denying tax-exempt status to schools which discriminate on the basis of race. This legislative action, through amendments to appropriations bills, could not, and indeed did not, affect the definition of any statutory term or the interpretation of any Code provision. It was negative in effect, refusing to fund certain IRS procedures.

27/ See Appendix F, infra. One statement by Congressman Dornan in these debates could be read to suggest that he understood the IRS to have authority to deny tax-exempt status to discriminatory private schools:

> The IRS already has sufficient authority to deal with private tax-exempt schools which discriminate because of race. The proposed IRS regulations, and Judge Wrights's [Judge Hart's?] unconstitutional usurpation of Congressional taxing and appropriations powers -- thinly disguised as a court order -- should be rejected by this body, and in any case, will be rejected by the voters this fall at the Presidential and congressional levels.

126 Cong. Rec. H7209 (daily ed., Aug. 19, 1980). However, this statement also could be read in context as an acknowledgement only that the IRS would continue to be able to act under its pre-August 1978 rulings and procedures. This would seem the more reasonable construction in light of the congressman's previous statements indicating that Green v. Connally lacked precedential authority and that tax exemptions should not be considered the equivalent of federal subsidies. See Appendix B.

In construing appropriations measures, the Court presumes that the legislature has not attempted to alter substantive legislation. In acting on appropriations measures, legislators are entitled to assume that the funds are being used lawfully without foreclosing a later finding -- congressional or judicial -- that the agency has in fact been acting unlawfully. As stated in Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-91 (1978) (emphasis supplied):

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation. . . . Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
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> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order." (Emphasis supplied)

Accordingly, the Ashbrook and Dornan Amendments afford no legitimate basis for ascribing to Congress an intent contrary to that reflected in the language of Section 501(c)(3) and its legislative history. Indeed, in light of the clarity

of the language of Section 501(c)(3), even less weight can be accorded to conflicting views of subsequent Congresses regarding the interpretation of the statute.

A similar issue of statutory construction was involved in SEC v. Sloan, 436 U.S. 103 (1978), which involved a reenactment in 1964 of Section 12(k) of the Securities Exchange Act of 1934. 28/ In the Senate committee report accompanying the 1964 legislation, the Commission's interpretation of Section 12(k) was endorsed. 29/ The Supreme Court rejected the argument that this later expression of congressional intent should prevail over the plain, and contrary, meaning of the statute, declaring (436 U.S. at 121):

> Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of reenactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12(k). On this point the present case differs significantly from United States v. Correll, [389 U.S. 299, 304 (1967)] where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that "to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position. . . ."

28/ Section 12(k) permits the SEC "summarily to suspend trading in any security . . . for a period not exceeding ten days" under certain specified circumstances.

29/ The Senate committee report stated:

> "The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation."

As in Sloan, the meaning of Section 501(c)(3) is clear from its language, and use of subsequent legislative history to suggest otherwise would result in "virtually untrammeled and unreviewable power" being vested in an agency. Moreover, there is even less reason here than in Sloan to construe subsequent legislative history as indicative of a particular statutory interpretation. Nowhere does a committee report endorse the interpretation given Section 501(c)(3) by IRS in 1970, save, arguably, for Congressman Dornan's single statement in debate on the 1982 extension of his Amendment (see n.27 supra,). 30/ In the context of the great differences of opinion expressed in the debates with regard to the validity of the Service's 1970 policy, this single

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30/ Shortly after the IRS announced its new position with regard to the tax exempt status of racially discriminatory schools, the IRS Commissioner appeared to testify before the Senate Select Committee on Equal Educational Opportunity. The Commissioner explained the Service's new policy and proposed modes of enforcement. The Chairman of the Select Committee urged him to monitor attendance records rather than to accept a private school's assurance of a nondiscriminatory admissions policy. Hearings, Equal Educational Opportunity before the Senate Select Comm., 91st Cong., 2d Sess. 1992-2028 (1970). This colloquy amounted to no more than a reiteration of the the Service's recent policy and an expression of approval by an individual Senator. No legislation pertaining to the tax laws was proposed or considered.

statement cannot be deemed indicative of a general congressional acceptance of that IRS ruling, particularly since Congressman Dornan's statement is ambiguous and arguably inconsistent with his previous statements and since the other sponsors had unambiguously rejected the Service's interpretation of its authority. See Appendix B. See Chrysler v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.") Moreover, unlike Sloan, Congressman Dornan's statement did not accompany the reenactment of Section 501(c)(3), but was made in the context of an appropriations bill, which, as noted above, is presumed not to have a substantive effect on existing law. In any event, even if there had been a congressional consensus in conjunction with subsequent reenactment of the legislation, Sloan holds that where, as here, the meaning of the original statute is clear, that meaning is not supplanted by Congress' subsequent views. See also United States v. Philadelphia National Bank, 374 U.S. 32, 349 (1963); Illinois Brick Co. v. Illinois, supra, 431 U.S. 720, 733-34 n.14.

D. Congressional Acquiescence

There remains only the question whether, notwithstanding the foregoing discussion, the IRS's practice since 1970 of

denying tax-exempt status to private schools that discriminate on account of race should be regarded as authorized by Section 501(c)(3) on the ground that Congress has allowed it to continue for some eleven years. Such a proposition arguably follows from the holding in Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 381, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."

This principle of statutory construction has in practice been used by the courts with great care, since its logical extreme would make an administrative construction unassailable in a very few years so long as Congress remains silent. In Red Lion itself, "the Congress ha[d] not just kept its silence by refusing to overturn the administrative construction, but ha[d] ratified it with positive legislation." Id. at 381-82. In Zemel v. Rusk, 381 U.S. 1 (1965), which is cited in Red Lion as authority for this principle, the administrative construction was uninterrupted for 26 years, and the Congress had not merely "refused to alter the administrative construction," but had reenacted the legislation without change. Id. at 12.

Subsequent to Red Lion, the Court has emphasized that the nexus between deference to administrative interpretation followed by reenactment of legislation without change. "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change." NLRE v. Aerospace Co., 416 U.S. 267, 274-75 (1974) (emphasis supplied); see Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

Other cases have held that while "it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. . . ., once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." United States v. Rutherford, 442 U.S. 544, n.10 (1979). Accord, Saxbe v. Bustos, 419 U.S. 65, 74 (1974) ("This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched."); Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978) (according

great respect to agency's longstanding construction when "Congress has been made aware of this practice, yet four times has 'revisited the Act and left the practice untouched'").

Recently, however, the Court rejected the argument that the SEC's interpretation of the Securities Exchange Act of 1934 should be adopted where "Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted . . . and on each occasion Congress left the administrative interpretation undisturbed." Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980). As the court explained:

> [S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.

Similarly, although Section 501(c)(3) has been amended since 1970, the only occasion on which the IRS construction with regard to discriminatory private schools was brought to the attention of the Congress was upon enactment of Section 501(i). But that legislation was addressed to matters other than the one at issue here: viz., various aspects of the tax treatment of private clubs' income. Nor was discussion of the 1970 IRS revenue ruling, which occurred in the context of an appropriation measure, equivalent to a failure to alter

administrative construction. As noted above, "[W]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden." Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978). Thus, as in Aaron, the failure of Congress to act falls far short of supporting a construction of Section 501(c)(3) "so clearly at odds with its plain meaning and legislative history."

The last point is perhaps the most important in this connection. Even where the agency's statutory construction has been consistent and longstanding, and even where Congress, having been informed of the agency's construction, has reenacted the statute without overturning that construction, the courts will reject an agency interpretation unsupported by the language of the statute and its legislative history. Sloan, supra, 436 U.S. at 119-20, 122-23. Indeed, here the argument for legislative acquiescence in agency interpretation of Section 501(c)(3) is much less compelling than that with regard to the statute at issue in Sloan. Sloan considered an agency construction which had stood consistently for 34 years, during which time the statute had been reenacted with a legislative history indicating approval of the agency construction. Id. at 117. The IRS construction of Section

501(c)(3) in regard to discriminatory schools has stood for only 11 years and represents a reversal of the agency construction given the statute for more than a half century preceding 1970. Moreover, here there has been neither statutory reenactment nor a process of amendment which focused attention on the IRS construction without changing it. In these circumstances, congressional silence cannot override the enactment years ago of specific legislation.

E. Case Law Supporting IRS Authority to Deny Tax Exemptions to Discriminatory Private Schools Under Section 501(c)(3)

Although the Supreme Court summarily affirmed the decision of the three-judge district court in Green v. Connally, 330 F.Supp. 1150 (D.D.C.) summarily aff'd per curiam sub nom., Coit v. Green, 404 U.S. 997 (1971), the question whether racially discriminatory private schools are entitled to tax exemption under Section 501(c)(3) remains open. A summary affirmance by the Supreme Court, while affirming the judgment appealed from, does not constitute an endorsement of the lower court's reasoning. Mandel v. Bradley, 432 U.S. 173, 176 (1976); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C. J. concurring). Moreover, the Court has cautioned that the Service's change in legal position during the course of the Green lawsuit made the appeal nonadversarial, stripped the summary affirmance of precedential weight accorded adversarial proceedings, and left unresolved the question of whether private schools under Section 501(c)(3) must satisfy the requirements of a common law charity. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974); Prince Edward School Foundation v. United States, ___ U.S.___, 101 S.Ct. 1408 n.1 (1981) (Rehnquist, J., joined by Stewart and Powell, J.J., dissenting from denial of certiorari).

The district court in Green and the Fourth Circuit Court of Appeals in Bob Jones University relied on Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958), to buttress the conclusion

that Congress intended to deny Section 501(c)(3) tax exemptions to private schools that practice racial discrimination. In Tank Truck, a trucking business deducted from gross income fines paid for violating state maximum weight laws. The taxpayer urged that the fines were "ordinary and necessary" expenses under the predecessor to Section 162(a) of the 1954 Internal Revenue Code. The Supreme Court affirmed the Commissioner's disallowance of the deduction, holding that an expense is not "necessary" to the operation of a business "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." The fines assessed against the taxpayer were for violations of penal statutes enacted to protect state highways from damage and to insure the safety of highway users. Observing that "[d]eduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature," the Court concluded that Congress did not intend to allow income tax deductions for fines incurred to punish violations of state penal laws.

The Tank Truck decision centered on the meaning of a "necessary" business expense under Section 162(a) of the Code. Nowhere did the Court suggest that other Code provisions should be construed to avoid direct frustration of sharply defined national or state policy. Indeed, even in the context of "ordinary and necessary" business deductions under Section 162(a), the Supreme

Court has admonished that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined " And, as the Court observed in Commissioner v. Tellier, 383 U.S. 68, 691 (1966):

> . . . The Federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Id. at 691.

In the absence of specific legislation denying deductibility to certain types of business expenses, "it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principle [of deductibility] reflected in [previous] decisions." Id. at 693-94.

Moreover, Congress circumscribed the denial of tax deductions on grounds of public policy in the aftermath of Tank Truck. In 1969 and 1971, Congress enacted rules to explicitly limit the public policy doctrine of nondeductibility. The Senate Finance Committee's report accompanying the 1969 enactment stated:

> The [newly enacted] provision for the denial of the deduction for payments in these situations which are deemed to violate public policy is intended to be all inclusive. Public policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions.

1969-3 Cum. Bull. 423, 597 (emphasis supplied). See Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51, 75 (1972). Congress has

thus manifested its intent to strictly limit the public policy doctrine applied by the Court in Tank Truck, and has declined to make racial discrimination a basis for applying the doctrine. See 26 U.S.C. §162(c) and (f).

Furthermore, as previously discussed, the language and legislative history of Section 501(c)(3) of the Code do not convincingly indicate an intent to carve out a federal or state public policy exception to the plain terms of the statute. Congress explicitly designated educational organizations as entitled to tax-exempt status under Section 501 (c)(3). Congress also has voiced a policy denouncing private acts of racial discrimination in school admissions, see 42 U.S.C. § 1981; Runyon v. McCrary, 427 U.S. 160 (1976), and by organizations receiving federal financial assistance, see 42 U.S.C. § 2000d, and has prescribed remedies of damages, injunctions, and the withholding of federal assistance for violations of the articulated policies. There is no indication in the language of Section 501(c)(3), nor its legislative history, that Congress also intended to make available as an additional sanction against racial discrimination the removal of tax-exempt status from otherwise qualified private schools. That policy decision is Congress' to make, not the courts or administrative agencies. Where Congress has not imposed such a sanction in explicit terms, to divine the remedy by implication is disfavored. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979).

This is not to suggest that Congress cannot, or indeed that it should not, undertake to enact legislation authorizing

denial of tax-exempt status to private schools that discriminate on account of race. The point is that it has not yet done so, either in Section 501(c)(3) of the Code or elsewhere.

F. Constitutional Concerns

Interpreting Section 501(c)(3) to afford tax-exempt status to private schools that practice racial discrimination raises no substantial constitutional question 31/ under the equal protection component of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). A facially neutral statute affronts equal protection norms protecting against racial discrimination only if its enactment was animated by a discriminatory purpose. Washington v. Davis, 426 U.S. 229, 239 244 (1976). Discriminatory purpose is not proven by demonstrating that the legislators foresaw a statute's discriminatory effects. An illicit purpose is established only by proof "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its" discriminatory effects. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Section 501(c)(3) is not tainted by any discriminatory purpose. Nothing in its language or legislative history suggests a purpose to afford tax-exempt status to educational organizations in order

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31/ Commentators have suggested that if tax exemptions were deemed to impose constitutional obligations on the recipient, no one would be immune, since for example, individual taxpayers receive "subsidies" in the form of interest deductions, charitable contribution deductions, and medical expense deductions, while corporations receive a surtax exemption. Bittker & Kaufman, supra at 68-74. "[T]he Internal Revenue Code is a pudding with plums for everyone."

to foster racial discrimination by private schools. The district court in Green acknowledged that Section 501(c)(3) was not actuated by a racially discriminatory purpose. 309 F. Supp. at 1136. Thus, Section 501(c)(3) is not per se unconstitutional.

As applied to private schools practicing racial discrimination, the tax exemption conferred by Section 501(c)(3) would be unconstitutional only if it made the government a veritable partner or joint venturer in the schools' enterprises. Moose Lodge v. Irvis, 407 U.S. 163, 176-177 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The grant of a tax exemption, simpliciter, does not make the government a sponsor or partner of the benefitted organization because it involves no transfer of government revenues, but only abstention from demanding that the beneficiary support the government. See Walz v. Tax Commission, 397 U.S. 664, 675 (1970). Nor does the mere fact that a tax exemption is valuable alter this conclusion in any respect. See Moose Lodge v. Irvis, supra (holding that an award of a state liquor license did not unconstitutionally implicate the state in the racially discriminatory policies of the recipient private club); Walz v. Tax Commission, supra at 674-675 (upholding tax exemption for churches).

Section 501(c)(3) plays absolutely no part in establishing or enforcing the racially discriminatory policies subscribed to by Bob Jones or Goldsboro. Nothing in the records in Bob Jones University or Goldsboro suggests that any other federal statute or government action inspired Bob Jones or Goldsboro to adopt their racially discriminatory practices. 32/ Accordingly, the tax exemptions accorded to Bob Jones and Goldsboro cannot be said to have unconstitutionally fostered or encouraged racial discrimination. Moose Lodge v. Irvis, supra at 176-177. Both the district court in Green 33/ and the court of appeals

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32/ The district courts in these cases found that the discriminatory practices were premised on sincerely held religious beliefs.

33/ In Green v. Connally, 309 F. Supp. 1127, 1136-1137 (D.D.C. 1970), the district court concluded that a serious constitutional question would be raised if tax exemptions under Section 501(c)(3) were obtained by private schools practicing racial discrimination. The court reasoned that government action that so increases the incidence of private discrimination as to frustrate the exercise of fundamental liberties violates the equal protection standards of the Fifth Amendment. The court further maintained that federal tax exemptions for private schools practicing racial discrimination would provide them significant support in a way that might obstruct desegregation goals of public school systems. That nexus between federal tax exemptions and the constitutional right to desegregated schooling, the court concluded, raised a difficult constitutional question.

The conclusion of the district court contravenes the teaching of Moose Lodge v. Irvis, supra, that economic benefits conferred by the government on racially discriminating private parties are constitutionally permissible absent proof that the benefits were an inspiration for the adoption or enforcement of the racially discriminatory practices. There was no suggestion in Green that the defendant schools were inspired by Section 501(c)(3) to adopt or enforce racially discriminatory policies. See also note 27, supra.

in Bob Jones University 34/ erred in concluding otherwise.

G. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits racial discrimination under any program or activity "receiving Federal financial assistance." Congress defined "Federal financial assistance" in 42 U.S.C. § 2000d-1 as "assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty." Department of Justice regulations that elucidate the meaning of Section 2000d-1 provide:

> The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at

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34/ In Bob Jones University, the court erroneously interpreted Norwood v. Harrison, 413 U.S. 455 (1973), as enjoining the government from providing "any form of tangible assistance" to schools which discriminate on the basis of race, and thus concluded that the government must "steer clear" of affording significant tax support to such organizations. 639 F.2d at 152 n.7. The Norwood decision, however, did not invalidate all government forms of tangible aid to discriminating schools, but only such aid as is readily available in the market and provided only to schools and not in common with other organizations. 413 U.S. at 415. Section 501(c)(3) tax exemptions are not limited to schools, and are not available from sources independent of the government. The exemptions, thus, do not run afoul of the Norwood rationale. Any suggestion that Norwood rendered constitutionally suspect all government benefits with racially discriminatory effects (see 413 U.S. at 466) is unpersuasive in light of Washington v. Davis, supra, and Massachusetts v. Feeny, supra, holding that a discriminatory purpose is necessary to establish an equal protection violation. The Norwood decision thus does not cast a constitutional cloud over the conferral of Section 501(c)(3) tax exemptions on private schools practicing racial discrimination.

> a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangment, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. §42.102(c).

The language of a statute should be read in its ordinary sense absent persuasive reasons that Congress intended otherwise. Burns v. Alcala, 420 U.S. 575, 580-581 (1975). "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc. 322 U.S.607, 618 (1944).

Title VI defines "Federal financial assistance" in terms of specified generic types of aid: grants, loans, and contracts other than contracts of insurance or guaranty. None of these categories understood in their ordinary senses includes tax exemptions. Moreover, the maxim of statutory construction expressio unius est exclusio alterius counsels that the term "Federal financial assistance" not be expanded beyond the three expressed generic categories. The Department of Justice explanatory regulations confirm this reading.

The legislative history of the 1964 Civil Rights Act also renders unpersuasive the contention that tax exemptions constitute federal financial assistance. There is no mention of the possibility that tax exemptions could be the basis for triggering

federal coverage under Title VI. A list of covered federal programs prepared by the Deputy Attorney General in connection with hearings on Title VI does not include tax exemptions as triggering coverage, even though the list referred to such minor instances of federal financial assistance as payments to three counties in Minnesota from the national forest fund and payments to the National Board for Promotion of Rifle Practice. Hearings on H.R. 7152 as amended by House Comm. on the Judiciary, 88th Cong., 2d Sess., pt. VI, ser. 4, at 2773 (1964). See generally, Bittker & Kaufman, supra at 83-84. "[I]f 'tax subsidies' were embraced by the statutory language [of Title VI], the legislators were unaware of that fact." Id. at 83.

Moreover, the proposition that income tax exemptions are "Federal financial assistance" is inconsistent with the structure of the Civil Rights Act of 1964. For example, Title II of the Act, relating to public accommodations, exempts from nondiscrimination requirements "an establishment located within a building which is actually occupied by the proprietor of such establishment as his residence. . . ." 42 U.S.C. §2000a (b)(1). However, if the proprietor claimed an investment tax credit on purchasing a new stove, and if such a tax subsidy were deemed "Federal financial assistance," the Title II exemption would be nullified. Similarly, under this conception of "Federal financial assistance" the exclusion of contracts of insurance and guaranty from coverage under Title VI would be cancelled if the contract recipient were a corporation which took advantage of the corporate surtax exemption. Bittker & Kaufman, supra, at 81.

A three-judge federal district court in McGlotten v. Connally, 338 F. Supp 448 (1972), erred in equating tax exemptions with "federal financial assistance." 35/ The district court conceded that neither the language, agency interpretations, nor legislative history of Title VI of the Civil Rights Act demonstrated an intent to include Section 501(c) tax exemptions within the ambit of federal financial assistance. Id. at 461. The district court insisted, nevertheless. that the "plain purpose" of the statute to promote nondiscrimination should override its plain language in determining whether federal tax exemptions constituted federal financial assistance. Id. The nondiscrimination purpose of Title VI would be advanced, the district court concluded, if some tax exemptions were equated with a distribution of federal funds, property, or use of federal personnel, and were thus treated as federal financial assistance.

The reasoning of the McGlotten district court is unsound. The court declined to apply the maxim that the plain language rather than the general purpose of a statute should govern its interpretation, absent contrary congressional direction. Burns v. Alcala, supra. In addition, the court's equation of tax exemptions with the distribution of federal funds seems premised on the idea that the government is entitled to all property and earnings of private parties, and thus a failure of Congress to tax constitutes federal financial assistance. The Supreme Court

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35/ No other court has concurred in the McGlotten conclusion that tax exemptions are within the ambit of 42 U.S.C. §2000d.

rejected that concept in Walz v. Tax Commission, supra, holding that a tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organization.

CONCLUSION

Congress has not empowered the IRS to deny Section 501 (c)(3) tax exemptions to private schools that engage in racially discriminatory practices. The Constitution also does not invest the IRS with such authority.

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX A

On presenting his Amendment, Congressman Dornan stated:

> Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50.

125 Cong. Rec. H5982 (daily ed. July 16, 1979).

Congressman Ashbrook stated as follows in presenting his Amendment:

> My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched.
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> * * *
>
> The thing to reemphasize is that my amendment would not in any way interrupt [IRS] continued case-by-case process which they were using up until August 22 and from which point they are going to change.
>
> * * *
>
> As I pointed out, under their current regulation 7450, they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away.

125 Cong. Rec. H5882 (daily ed. July 13, 1979).

In proposing the Ashbrook amendment on the Senate floor, Senator Helms stated:

> Mr. President, the purpose of this amendment is quite simple: it places a 1-year moratorium on the ability of the Internal Revenue Service to establish new procedures -- and I emphasize the word "new" -- regarding the termination of the tax-exempt status of private schools. This prohibition is forward looking only. It is not retroactive. IRS would still be able to enforce all regulations which were in effect as of August 22 of last year.
>
> Under my amendment, the IRS may still move to withdraw the tax exempt status of a school which has failed to meet the standards of Revenue Procedure 75-50.
>
> * * *

The existing law provides substantial procedures for the IRS to deny the tax exempt status of schools which discriminate.

In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis.

125 Cong. Rec. S11979-80 (daily ed. Sept. 6, 1979).

APPENDIX B

Congressman Dornan indicated that he did not consider Green v. Connally to be authoritative precedent and that he disagreed with the proposition that tax exempt status is a form of federal subsidy:

> The IRS claims that it is under court order to remove the tax-exempt status of private schools engaged in racial discrimination. But the Green v. Connally (1971) case upon which it relies was limited solely to segregated academies with no open admissions policies in the State of Mississippi. The court, moreover, explicitly refrained from deciding the question of religious private schools. In addition, the Supreme Court case of Bob Jones University v. Simon (1976) held that the Green case was not a true adversary proceeding and therefore could not serve as a legal precedent.
>
> Mr. Chairman, there is another point of paramount importance that needs to be made. The denial of tax-exempt status to private schools is predicated on the assumption that tax exempt status is a form of Federal assistance or subsidy. Such an assumption not only assumes that the Government owns all wealth, but flies in the face of original congressional intent as well as the Supreme Court case of Walz against Tax Commission of the City of New York (1970). Professors Bittker and Radhert of Yale University point out that "The tax exemption of non-profit organizations from federal taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit," 85 Yale Law Journal, at 299 (1976). Justice Brennan in his concurring opinion in the Walz case notes that, "Tax exemptions and general subsidies are qualitatively different." In short, the assumption that tax exemption is a form of Federal assistance or subsidy is thoroughly totalitarian in nature allowing the Government to tax everything that lives, moves, and has being.

125 Cong. Rec. H5980 (daily ed. July 16, 1979).

In proposing the Ashbrook amendment on the Senate floor, Senator Helms stated:

> [E]arlier this year I was joined by Senators FORD, SCHWEIKER, STEVENS, and ZORINSKY in introducing S. 995, the Private School Non-Discrimination and Due Process Act of 1979. This legislation would for the first time expressly authorize the IRS to move to terminate the tax-exempt status of private schools which discriminate. . . .

125 Cong. Rec. S1980 (daily ed. Sept. 6, 1979) (emphasis supplied). The bill referred to by Senator Helms states as part of the congressional "findings":

> (a)(2) . . . Congress has failed to provide guidance as to the tax-exempt status of [private elementary schools which discriminate on the basis of race in the admission of students];
>
> (3) revenue rulings and procedures adopted by the Internal Revenue Service which deny tax-exempt status to private schools that discriminate on the basis of race are not based on a specific statute but rest on broad grounds of fundamental public policy as determined by the Service. . . .

S.995, 96th Cong., 1st Sess. (April 24, 1979).

In debate the preceeding day regarding an amendment which would have struck the Dornan Amendment from the Appropriations bill, Senator Helms, who was in control of debate time in opposition to striking the Dornan Amendment, was even more explicit about his view of IRS authority to deny tax exemptions to private schools:

> Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purposes as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet the requirements of one of the other listed purposes.
>
> The enumeration of exempt purposes in section 501(c)(3) is plain and unambiguous. It states that

organizations are exempt which are "organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." By the rules of statutory construction, the word "or' [sic] must be read after each of the listed categories. This section is to be read to mean "religious OR charitable OR scientific OR educational."

Congress clearly did not intend that "religious" or "educational" purposes be included under or in addition to a requirement of a "charitable" purpose. If Congress had wanted to provide for the double test of charitable and one other listed purpose, it could have done so with language such as "organized and operated exclusively for charitable (including, religious, scientific, testing for public safety, literary, or educational) purposes." However, Congress did not use this statutory construction.

One important reason for rejecting such statutory language is the fact that it misstates the purpose of a religious organization. A church or a church-related school is not organized and operated exclusively or even substantially for charitable purposes. Such an organization is organized in the exercise of constituionally protected rights of worship and religion which may or may not include works of charity. As the Supreme Court recognized in Waltz [sic] v. Tax Commission, 397 U.S. 664 (1970), the tax exemption of religious organizations does not depend upon their serving some pragmatic community purpose.

125 Cong. Rec. S11835 (daily ed. Sept 5, 1979).

Mr. President, since the IRS announced its policy to deny tax exempt status to private schools which allegedly operate on the basis of a policy of racial discrimination, it has done so without the legal authority of specific legislation. In a public statement made on January 9, 1978, IRS Commissioner Jerome Kurtz discussed the proposed regulations and admitted that the IRS has "almost no specific statutory guidance" in moving into this area.

Instead, the IRS has argued that private schools must be treated as charitable organizations and has applied to them the common law principle that a charity must not operate illegally or contrary to public policy. The IRS has then defined this broad public policy mandate in terms of Brown against Board of Educaton and Title VI of the Civil Rights Act of 1964.

125 Cong. Rec. S11834 (daily ed. Sept. 5, 1979).

Congressman Ashbrook's view that the IRS Code does not permit denial of tax exemptions to private schools which discriminate is set forth in Appendix F.

APPENDIX C

Senator Helms:

> My amendment is neccessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem.
>
> For example, earlier this year I was joined by Senators FORD, SCHWEIKER, STEVENS, and ZORINSKY in introducing S.995, the Private School Non-Discrimination and Due Process Act of 1979. This legislation would for the first time expressly authorize the IRS to move to terminate the tax-exempt status of private schools which discriminate.

125 Cong. Rec. S11980 (daily ed. Sept. 6, 1979).

Congressman Dornan:

> What I will do is say this to the gentleman: It is the 16th of July. The year is almost half over. If the gentleman will help us restrict the IRS for the tenure of this bill, I will be willing to come back with the gentleman and with any caucus in this House and figure out a way to put an end to any schools that we see set up in the next year or after this bill has run out and we have another bill before us that would try to turn race against race in this country and do it under the name of education.
>
> * * *
>
> I have 434 colleagues, including myself, because I think everyone in this House is of good will on this issue, I do not think there is anything that this Congress is prevented from doing in this area if we set our mind to it. I really do not.

125 Cong. Rec. H5980 (daily ed. July 16, 1979).

Congressman Dornan had introduced legislation providing that tax exemptions and the deductibility of contributions to tax exempt organizations not be construed as providing federal subsidy or assistance. In his view, the IRS had predicated its denial of tax exempt status to discriminatory private schools on the assumption that tax exempt status was a form of federal subsidy. See 125 Cong. Rec. H5980 (daily ed., July 16, 1979).

APPENDIX D

Legislators whose remarks indicate that they did not believe the Code empowered the IRS to deny tax exemptions to racially discriminatory schools:

> This regulation is a perfect example of why the framers of the Constitution left all legislative authority with Congress. In trying to accomplish what they perceive to be a desirable social policy, well-meaning bureaucrats have based their regulations on fallacious principles. These IRS regulations assume that a tax exemption is the equivalent of direct Federal assistance. Federal subsidies have always been a vehicle to spread and enforce Federal regulations. But Federal regulations have never been connected to tax exemptions. If we were quietly to accept that tax exemptions are actually Federal aid, we would be tacitly agreeing that the Federal Government owns all wealth, that the Government merely allows us to keep that portion it chooses not to tax away for now. We would be agreeing that the Government may attach regulations to the portion we are "allowed to keep" exemptions [sic] as readily as to the portion it redistributes subsidies [sic]. I do not need to tell you that such logic would be fatal to the fundamental American principles of freedom and private property. No wonder the framers of the Constitution were wise enough to deny the bureaucracy or executive branch any legislative jurisdiction.

125 Cong. Rec. H5981 (daily ed. July 16, 1979)(Congressman Philip M. Crane).

> I support the rationale of the IRS. Their ruling is well-intentioned. Schools guilty of racial discrimination should not only be stripped of their tax exempt status, but should be shut down. But the tax structure is not the proper mechanism to enforce this public policy.

125 Cong. Rec. H5982 (daily ed. July 16, 1979)(Congressman Goldwater).

> This is not to suggest that the goals of the IRS are entirely wrong. Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions.

125 Cong. Rec. H5884 (daily ed. July 13, 1979)(Congressman Grassley).

> Mr. Chairman, the serious questions of integration of our schools; of allowing tax policies, via exemptions, and so forth, [to] be used to affect the conduct of national affairs, private education, separation of church and state, and the many other serious problems involved in this matter, should not be left to or allowed to be the province of the IRS.

125 Cong. Rec. H5885 (daily ed. July 13, 1979)(Congressman Duncan)(statement inserted in the record).

> Further [the sponsors of the amendment to strike the Dorman amendment from the 1980 Appropriations bill] would have us believe that this question is solved by the case of Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), affirmed without opinion by the Supreme Court in that year. I would suggest once again that the situation is not as simple as we are told.
>
> In a 1974 case between Bob Jones University in my State and the IRS, Justice Lewis Powell noted that "the question of whether a segregative private school qualifies under section 501(c)(3) has not received plenary review in this Court, and we do not reach that question today." I repeat, has not. This is 3 years after the case Senator JAVITS and his colleagues cite as dispositive of the issue. Now they may wish that the issue were decided and may know how they want it to be decided, but I submit that it has not been decided. It is not, therefore, up to the IRS to decide it.

125 Cong. Rec. S11837 (daily ed. Sept. 5, 1979)(Senator Thurmond).

> The Senate should be concerned over the assumption by IRS that the Congress has given it the plenary powers which are implicit in its proposed procedures. It can express this concern by defeating the Ribicoff-Javits amendment.
>
> The issue of the tax status of private schools is a matter of far reaching social and educational significance. While the responsibility of the IRS is to enforce the tax laws, it should be allowed to expand its power in this sensitive area only when the legislative mandate and authority is clear and explicit.
>
> The Senate should take the position that we have not vested the IRS with the power which it has attempted to exercise in this area. It is clear that we have not given IRS a blank check to proceed as its uncontrolled discretion dictates to deny the tax exemption status of private and religious schools which the Congress itself has not seen fit to deny.

125 Cong. Rec. S11852 (daily ed. Sept. 5, 1979)(Senator Stennis) (statement inserted in the record).

. Legislators whose remarks indicate that they did believe the Code empowered the IRS to make its 1970 policy ruling:

> No one is saying that we should allow tax breaks for segregated schools, but IRS already has significant authority to act, and indeed, has done so in the past, where evidence of discrimination exists.

125 Cong. Rec. H5982 (daily ed. July 16, 1979)(Congressman Miller).

> If I may discuss that for a moment, I think it is because the Congress through the years, and particularly the last couple of decades, has transferred so much legislative power to the agencies of Government that we are now searching for a way to oversee that legislative activity which, basically, is what the IRS has undertaken, and other agencies have, also, and the reason we see this proliferation of legislation on appropriations bills.
>
> It is the only annual mechanism we have that is reasonably reliable, to say, "Agency, you shall not do that. You shall not legislate in that area, because Congress does not want you to legislate in that area."
>
> But we have given them such broad authority to do so, this is the only way we have to try to get back some of that authority.

125 Cong. Rec. S11984 (daily ed., Sept. 6, 1979)(Congressman Schmutt).

> We must not [through enactment of the Dornan amendment] take away the tools of the IRS to enforce the law.

125 Cong. Rec. S11833 (daily ed. Sept. 5, 1979)(Senator Javits).

> The IRS, in this instance, is actually only implementing the law of the land. Now we are attempting by legislation, to bar them from doing so.

125 Cong. Rec. S11835 (daily ed. Sept. 5, 1979)(Senator Metzenbaum).

> For this Senate, in an appropriations bill, to attempt to remove the power of the IRS to carry out its substative duty is misguided and premature. If we wish to change the Internal Revenue Code or the Constitution, there are appropriate ways to do so. This amendment [to strike the Dornan amendment from the 1980 Appropriations Act] restores funds which the IRS needs to enforce existing law and the Constitution as interpreted by our courts. That is all the amendment does. It does not endorse the underlying law or court decisions.

125 Cong. Rec. S11851 (daily ed., Sept. 5, 1979)(Senator Levin).

APPENDIX E

Congressman Ashbrook:

> I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS's ability to withdraw the tax-exempt status of any school which might violate the law. That is why the words "August 22, 1978," are in there. . . .

127 Cong. Rec. H5395-96 (daily ed., July 30, 1981).

Congressman Dornan:

> The Dornan amendment to the Treasury appropriations bill prohibited funds for implementation of the original proposed revenue procedure of August 22, 1978, the revision of February 3, 1979, "or parts thereof."

126 Cong. Rec. H7210 (daily ed., Aug. 19, 1980).

APPENDIX F

In a speech preceding the vote on the Ashbrook and Dornan Amendment extensions, Congressman Ashbrook referred to the statement of William B. Ball before the Oversight Subcommittee of the House Ways and Means Committee as "the classic analysis of the legal and constitutional issues involved in this matter," and had the text of Mr. Ball's statement insorted in the record. 126 Cong. Rec. H5200 (daily ed., June 18, 1980). Mr. Ball's statement refutes the statutory and constitutional arguments which have been offered to support the 1970 IRS change of policy, and specifically states that the Internal Revenue Code does not give the Service the authority to deny tax exempt status to private schools which discriminate on the basis of race:

> The Commissioner's point was that a private school, under Section 501(c)(3), is a "charity" -- i.e., a private organization whose purposes are of high social interest to the community. A charitys' [sic] tax exemption, so the argument goes, is conditioned upon its concordance with what, at any particular time, is considered to be "public policy." Since there is a public policy against racial discrimination, a private school practicing racial discrimination may not be tax exempt. A basic error in the Commissioner's (and Judge Leventhal's) argument lies in its failure to reflect the plain language of Section 501(c)(3), which says the organizations are exempt which are:
>
> "* * * organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes * * *" (Emphases [sic] supplied).
>
> By familiar and inevitable construction, the word "or" is to be read after each of the listed categories -- i.e., "religious OR charitable OR scientific * * * (etc.)." The Congress did not, in other words, include "religious" or "educational" under the term "charitable." Had the Congress desired to classify religious purposes as a species of charitable purposes, it would have do [sic] so -- e.g., with phrasing such as:
>
> "* * * organized and operated exclusively for charitable (including, religious, scientific, testing for public safety, literary, or educational) purposes. * * *"
>
> This the Congress did not do, and it is plain that "religious" purposes cannot be slid under the heading of "charitable" and churches, by that device, made subject to the "public policy" of the moment. Here it is important to add that, as the Supreme Court recognized in Walz, the tax exemption of religious institutions does not depend upon their serving some pragmatic community purpose. Religious purposes are unique, and religious tax exemption closely allied to religious liberty.

126 Cong. Rec. H5200-01 (daily ed. June 18, 1980) (Statement William B. Ball).

Mr. SCHMULTS. During the course of the Department's deliberations on the legal questions raised in the *Bob Jones* and *Goldsboro* cases, letters were received from Congressman Trent Lott expressing interest and views on the matter. In April 1981, Congressman Lott sent a letter to the Attorney General in which he urged the Department to reverse the legal position it advanced in the court of appeals in the *Bob Jones* case. On behalf of the Attorney General, I responded to Congressman Lott and informed him that the Department intended to acquiesce in the grant of certiorari in the *Bob Jones* case.

On October 30, 1981, Congressman Lott sent another letter to the Attorney General in which he advanced several legal reasons for the Department to reverse its legal position in the *Bob Jones* litigation. On December 15, I informed the Congressman by letter that the United States would continue to argue in support of IRS authority to deny tax exemptions on the ground of Federal public policy since the Department of Treasury, the client in the case, had not decided otherwise.

On December 21, 1981, I received a letter from Congressman Lott again urging that the Department of Justice reconsider its legal position in the *Jones* case. Attached to that letter was what appeared to be a page from the President's correspondence log indicating the concurrence of the President with the views of Congressman Lott.

As with countless controversial cases involving the United States, the Department of Justice was aware of the views and concerns voiced by Members of Congress and others in the *Bob Jones* and *Goldsboro* litigation. On the other hand, the Department of Justice is entrusted with the responsibility of faithfully executing the laws and interpreting the Constitution and statutes. It would be a breach of this obligation if the Department of Justice were to depart from an objective legal analysis for political or other reasons. I can assure this committee that the decision made by the Department to advise the Treasury that the Internal Revenue Service lacked authority to deny tax exemptions on the grounds of Federal public policy was made solely on the basis of objective legal analysis.

Mr. Chairman, I cannot state emphatically enough that this decision was compelled by the Department's view of the law—specifically section 501(c)(3) of the Internal Revenue Code of 1954. Pertinent language of section 501(c)(3) exempts from taxation "Corporations * * * organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, *or* education purposes, *or* for the prevention of cruelty to children or animals * * *." And I have emphasized those two "ors." That language was interpreted by the three-judge Federal district court in *Green* v. *Connally,* as requiring organizations satisfying any one of the enumerated purposes also to be charitable in the common-law sense—that is, in the sense that the organization's purposes and practices must accord with public policy in order to qualify for tax-exempt status. *Green* was summarily affirmed by the Supreme Court in the case of *Coit* v. *Green.* However, summary affirmances have little precedential value. And in this instance, as the Supreme Court has itself subsequently noted, the special circumstances in *Green* made the summary affirmance of no binding significance.

Thus, the core question remained unresolved: Did Congress intend by enactment of section 501(c)(3) to authorize the Internal Revenue Service to withhold tax-exempt status from otherwise qualified organizations based on the organizations' adherence to practices deemed by the Service to conflict with public policy. As set forth in detail in the analysis of legal authorities submitted today, an examination of congressional intent has led the Department of Justice to conclude that it did not.

The search for legislative intent begins, of course, with the words of the statute to be construed. Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive with the word "or," manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions. This commonsense interpretation of the language of section 501(c)(3) is reinforced by the settled canon of statutory construction requiring that related provisions be interpreted *in para materia*. Sections 503, 504, and 513 of the code, sister provisions of Section 501(c)(3), reiterate the separate and disjunctive purposes and functions described in section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for exemption under section 501(a)."

Indeed, the regulations promulgated by the Service under section 501(c)(3) expressly provide that each of the purposes specified in that section is an exempt purpose in itself. And an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes.

Where statutory language is so clear and unambiguous, courts traditionally decline to examine legislative history, citing the *Hochfelder* case. We did not end our inquiry with the plain meaning of the code provision, however. Rather, we undertook a comprehensive review of the legislative history to ascertain whether it revealed support for the proposition that Congress intended to deny tax-exempt status to otherwise qualified organizations deemed by the Internal Revenue Service to violate public policy. We found none.

The provisions now contained in section 501(c)(3) originated as part of the Tariff Act of 1894, which exempted from taxation organizations conducted solely for charitable, religious or educational purposes. There is nothing in the legislative history of this early revenue act, nor in the legislative history of the many subsequent congressional reenactments of this same basic provision, indicating that Congress intended that bona fide educational or religious organizations must also meet all characteristics of a common-law charity.

To the contrary, the interpretive regulations issued by the Internal Revenue Service in connection with these revenue acts, and followed by the Service for over 50 years, uniformly interpreted the word "charitable" in its popular and ordinary sense as meaning relief of the poor, rather than in its broader common-law sense. Not until 1959 did the Internal Revenue Service broaden its regulatory definition of charitable beyond merely relief of the poor to include purposes such as advancement of religion, advancement of

education or science, and lessening the burdens of government. Even then, however, that same regulation, defines educational without any reference to the concept of charity, thus reflecting the Service's pre-1970 view that although charitableness is not confined to relief of the poor, an educational organization need not also be charitable in order to qualify for tax-exempt treatment under section 501(c)(3).

In sum, Mr. Chairman, we were unable on the most painstaking examination of the statute and its history to find support for the position, advanced by the IRS for the first time in 1970, that private schools pursuing racially discriminatory policies could be denied a tax exemption. Indeed, the IRS long maintained itself that such a denial would be unauthorized agency action. It was in fact arguing that very position in *Green* at the time of its sudden reversal in 1970 on explicit directions from the White House.

Nor could we find evidence of congressional action subsequent to 1970 that suggests ratification by both House and Senate of the Service's practice in this area over the last 11 years. To the contrary, Congress recently expressed grave reservations concerning the authority of the IRS to deny tax-exempt status to organizations deemed to be in violation of public policy. Sponsors in both the House and the Senate of the Ashbrook amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1980 maintained that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory policies. In barring the prospective use of funds for such purposes in the Ashbrook amendment, Congress made it abundantly clear that it was leaving undisturbed the status quo with respect to denials of tax exemptions between 1970 and 1978 so as to provide a full opportunity for the legislature to consider the correctness of the Service's interpretation of section 501(c)(3). By no conceivable stretch of the imagination can this legislative activity in connection with a rider to an appropriations bill be regarded as approval or ratification of the very construction of section 501(c)(3) that was at that time being so roundly criticized.

The legal conclusion seems to us, Mr. Chairman, to be inescapable. Congress intended, as deduced from the statute's language and legislative history, the Service's interpretive regulations and subsequent congressional activity, that section 501(c)(3) exempt from income taxation educational organizations that are not also charitable as surely as it exempts charitable organizations that are not also educational. The contrary construction accorded the statute by the district court in *Green* and the Fourth Circuit Court of Appeals in *Bob Jones* and *Goldsboro* does a disservice to the most basic canons of statutory construction, and we cannot in good conscience support that position.

In reaching this conclusion, we looked, as well, at title VI of the Civil Rights Act of 1964 to determine whether the grant of a tax exemption to a private school that racially discriminates would violate that Federal statute. As you know, Mr. Chairman, title VI prohibits racial discrimination under any program or activity receiving Federal financial assistance. And the claim has been made by some that a tax exemption can be regarded as such assistance.

Quite frankly, this contention, in our view, is wholly without merit. Title VI defines Federal financial assistance in terms of specific generic types of aid: Grants, loans, and contracts other than contracts of insurance or guaranty. None of these categories, understood in their ordinary sense, includes tax exemptions. This is underscored by the legislative history of the 1964 act, which includes considerable discussion of the types of Federal funding that would bring a program or activity within title VI coverage and nowhere mentions tax exemptions as triggering such a result.

There is one district court case, *McGlotten* v. *Connally* in 1972, that equates tax exemptions with Federal financial assistance. In reaching that result, the district court conceded that its conclusion found no support in either the language, agency interpretations, or the legislative history of title VI. Nonetheless, it held that the plain purpose of the statute to promote nondiscrimination was sufficient to override the plain language and one-sided legislative history.

The logic of such reasoning has far-reaching ramifications. In essence, the district court in *McGlotten* viewed a tax exemption as a Government subsidy, inexplicably equating it with a distribution of Federal funds. If this view were to prevail, essentially all property and earnings of private parties would effectively belong to the Government, and a failure of Congress to tax would constitute Federal financial assistance. The Supreme Court explicitly rejected that concept in *Walz* v. *Tax Commission*, a 1970 case, holding that a State tax exemption reflects only Government restraint from demanding private financial support for the Government, not a flow of assistance or revenues from the Government to the exempt organizations. In our view, *Walz* is a complete answer to the title VI assertion made in the *McGlotten* decision.

Having reached the conclusion that an argument to support the interpretation that had been given to section 501(c)(3) since 1970 should not be advanced in the Supreme Court, we felt compelled to recommend to the Treasury Department that it no longer pursue that course. There was clear recognition at both the Department of Justice and the Department of Treasury that such a reversal of position would likely be misunderstood and mischaracterized by many as encouragement, or at the very least tolerance, on the part of the Government of what are sometimes referred to as "segregation academies." When confronted with the identical politically explosive issue in 1970, the Nixon administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified.

This administration, Mr. Chairman, has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to principle over political expediency. As a consequence, decisions have been made, and policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounded on high principle. This is but another example of the administration's commitment to that approach.

Here, the principle involved is among the most fundamental of democratic government. The first sentence of the Constitution declares: "All legislative powers herein granted shall be vested in a

Congress of the United States which shall consist of a Senate and House of Representatives." This provision, and similar grants of power to the executive and judicial branches in articles II and III of the Constitution, reflect a scheme of checks and balances integral to freedom and ordered liberty. Under article II of the Constitution, once the meaning of a law is discerned, the executive is charged with its faithful execution.

The Internal Revenue Service's practice since 1970 of denying tax exemptions to private schools that discriminate runs directly counter to that constitutional scheme. It opens the door for administrative agencies to legislate by administrative fiat, and, without guidance from Congress, to make fundamental policy decisions that impact directly on every citizen in this country. Such transgressions by the executive on congressional prerogatives are most inviting where the end being sought, that is, the removal of racial discrimination in our educational institutions, is a common objective to which all branches of government subscribe. But it is precisely in such circumstances that we must be sure that principle wins out over emotion, no matter how difficult the decision may be.

Mr. Chairman, the power to grant or deny exemptions from taxation is legislative in nature. Congress has not yet authorized the Internal Revenue Service to withhold exemptions from private schools on the ground that they practice racial discrimination. The President has forwarded to the Congress legislation that would grant the IRS such authority. He has asked that you give this matter the very highest priority and enact the legislation as rapidly as possible.

This administration is concerned with, and sensitive to, minority interests and civil rights concerns. In enforcing the many Federal statutes that afford protections in this as well as other areas, we must, of course, uncompromisingly discharge our responsibility to uphold the Constitution and laws of the land. That responsibility cannot be carried out faithfully, and with full integrity, if we allow administrative agencies, no matter how well intentioned, to act on their own in seeking to achieve even the most laudable ends.

That was the fundamental issue in the *Bob Jones* and *Goldsboro* cases. And it was for the reasons that I have stated that the Department of Justice concluded as a matter of law, notwithstanding our repugnance for the racially discriminatory practices of the two schools, that the IRS practice since 1970 could no longer be supported.

That's the end of my statement, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Schmults.

[The prepared statement follows:]

STATEMENT

OF

EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

Mr. Chairman and Members of the Committee --

I am pleased to appear before this Comittee today to explain the Department of Justice's role in the decision by the Administration to change its position in the Bob Jones University and Goldsboro Christian Schools cases, and to review with you the legal basis for that decision. With me on the panel is William Bradford Reynolds, the Assistant Attorney General for Civil Rights.

There is, I believe, no issue that deserves more serious attention, or requires more thoughtful reflection, than the one now being addressed by this Committee. The announcement on January 8, 1982, regarding the eleven-year practice of the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code has understandably evoked nationwide controversy. It has erroneously been perceived by many as a dramatic retreat from the commitment of this Administration to pursue an active and vigorous enforcement policy in the area of civil rights. And, some have characterized the decision as an open endorsement of racial discrimination.

Mr. Chairman and members of this Committee, the charge that racial considerations entered the Administration's decision concerning the tax-exempt status of private schools is absolutely false. The President's record, both in word and deed, speaks unmistakably and unequivocally to his abhorrence of racial discrimination. In submitting to the President of the Senate and the Speaker of the House of Representatives the tax-exemption legislation that this Committee will now consider, the President declared:

"I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and our citizens hold dear, and I believe this repugnance should be plainly reflected in our laws."

These words reflect not only the President's sentiments, but those of his Administration and of the overwhelming majority of the American people who deplore racial discrimination in any form. The Attorney General emphatically underscored this position just last week in a colloquy with Senator Kennedy during his appearance before the Senate Subcommittee on the Constitution to support the extension of the Voting Rights Act. "I yield to no man," he stated, "in my abhorrence of racial discrimination."

I, too, Mr. Chairman, yield to no man in my intolerance of discrimination, and I know Mr. Reynolds shares that view. On this point, we are adamant and uncompromising. This Administration remains dedicated to continuing the hard-fought battle to eradicate racial discrimination from our Nation.

This Committee has inquired as to how the Department of Justice, as part of an Administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race. The answer, Mr. Chairman, is that we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a

constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.

While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the precise legal issue was before the United States Supreme Court in the Bob Jones University and Goldsboro cases. Thus, at least four members of the Court considered the question sufficiently unsettled to warrant Supreme Court review.

I am here today to explain the reasons for the Department's advice regarding the authority of the Internal Revenue Service, and to describe the legal deliberations that antedated that advice. While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and federal law.

A recitation of the events that culminated in the Department's conclusion that the Internal Revenue Service lacks authority to employ federal public policy to deny tax-exempt status to nonprofit private schools is necessary to appreciate fully the decision that was made.

In February 1981, a panel of the Fourth Circuit Court of Appeals in Bob Jones University v. United States, ruled by a 2-1 vote that the denial of tax exemptions to private schools on public

policy grounds is authorized by Section 501(c)(3) of the Internal Revenue Code of 1954. That decision was followed by a second panel decision of the Fourth Circuit, again divided 2-1, in Goldsboro Christian Schools v. United States. The court in Goldsboro "simply affirm[ed] the district court for the reasons advanced in the Bob Jones University case." Both schools filed writs of certiorari seeking review of the decisions by the United States Supreme Court.

The United States participated in both Bob Jones and Goldsboro in the Fourth Circuit, and there argued that the IRS practice was authorized by statute.

In September 1981, officials of the Department of Justice met with officials from the Internal Revenue Service to discuss the Government's response to the pending certiorari petitions. The IRS urged that the United States acquiesce in the petitions because it believed that a definitive Supreme Court ruling was both needed and desirable regarding the authority of the Service to invoke public policy as a basis for denying tax exemptions. The Department of Treasury did not participate in these discussions.

On September 19, 1981, the Department of Justice filed a Brief for the United States in the Supreme Court that urged, as IRS had requested, that the petitions be granted. That Brief, following the position that the Government had taken in the court of appeals, stated an intent to support the authority of the IRS to deny tax exemptions to Bob Jones and Goldsboro, if the cases were heard on the merits.

In October 1981, the Supreme Court granted certiorari in the Bob Jones and Goldsboro cases. Following the grants of certiorari, the Tax Division undertook to prepare a draft brief on the merits for review by the Solicitor General's office. That effort was completed sometime in late November or early December and -- as had been the case throughout these litigations in light of the unmistakable civil rights implications involved -- copies were distributed to the Civil Rights Division for review and comment.

In early December, 1981, Mr. Reynolds, and others in the Department who had reviewed the Tax Division draft, voiced concern to me over the claimed legal basis for IRS authority to deny tax exemptions to private schools under Section 501(c)(3). For Mr. Reynolds, the issue was particularly troublesome. As the chief law enforcement official of the Administration in the area of civil rights, he recognized fully the implications of a determination that the IRS had been acting without sufficient legal basis in this area since 1970. At the same time, he believed that the Administration should not take a position in the Supreme Court countenancing unauthorized administrative action, if our legal analysis convinced us that the position of the Fourth Circuit could not be sustained.

On this point I fully agreed. While the entire focus of media attention on this issue has been in terms of the civil rights implications -- which certainly is understandable -- there is another equally fundamental consideration that seems to have been

largely overlooked. The Bob Jones and Goldsboro cases raise in the starkest terms an issue that goes to the very heart of our constitutional form of government. Under Article I of the Constitution, the legislative powers in this country are vested in the Congress of the United States, not in the Judicial or the Executive Branches. It is for Congress to make national public policy by the enactment of laws and it is Congress' responsibility to devise by law the sanctions to be imposed on those individuals and institutions in our society who fail to adhere to those laws.

The concern of Mr. Reynolds and others in the Department over the Fourth Circuit's decisions in these cases -- a concern, I must say, that I shared -- is that it endorsed an administrative practice and procedure that was not simply lacking in Congressional authority, but seemed to be directly contrary to the legislative directive in Section 501(c)(3) of the Internal Revenue Code. If that proved in fact to be the case on a comprehensive legal analysis of the statute and its legislative history, the Internal Revenue Service -- not Congress -- was determining, on the basis of national policy, how the taxing laws should be administered and enforced. In the context of a private school practicing racial discrimination, there is no one in this room who would argue with the proposition that such behavior deserves the harshest condemnation. But, I also believe there are few here who would quarrel with the proposition that it is Congress'

responsibility to declare by law how that condemnation is to be expressed and what sanctions are to be applied.

If that Constitutional imperative is ignored in one politically sensitive area, it is difficult, indeed impossible, to see why it should not be ignored elsewhere. Let us assume that the Internal Revenue Service today may, without congressional authorization, determine on the basis of what it genuinely perceives as national policy considerations that tax-exempt status should be denied to private schools that discriminate on grounds of race. Tomorrow, the tax exemption could well be eliminated by the Service -- again without any congressional action -- for private schools that enroll only males or females. Presumably, hospitals that either do or do not permit abortions could be equally vulnerable to the taxing decision of the IRS on the basis of its perception of national policy in this area at any given point in time.

That prospect -- i.e., leaving the tax-exempt status of private schools and institutions to the sole discretion of the Internal Revenue Service based on its independent view at the moment of national policy goals -- runs counter to our most fundamental principles of democratic government. As the President of the United States made clear throughout his campaign and his first year in office, the laws of this country are to be made by Congress, not by "administrative fiat," or by judicial activism.

It is this principle that lies at the core of the legal issue in the Bob Jones and Goldsboro cases. While it comes to the fore

in a context that regrettably has overtones in the civil rights area, which inevitably ignites passionate debate, that fact should make us more, rather than less, attentive to reaching a proper legal conclusion. As offended as we are by the racially discriminatory practices of Bob Jones University and Goldsboro -- practices that we in no way condone or accept -- we cannot allow our strong disagreement with such policies to dissuade us from coming to grips with the hard legal issue that is presented. There is but one thing more important to the civil rights movement in this country than combatting racial discrimination, and that is that the combat be waged within the letter and spirit of the law as determined by Congress, not outside the law or in disregard of the federal statutes on the books.

In response to these concerns, I convened a meeting on December 8, 1981, with representatives of the Solicitor General's office, the Tax Division, the Civil Rights Division and other lawyers in the Department to discuss the legal position of the United States regarding the authority of the Internal Revenue Service to deny tax exemptions to private schools under Section 501(c)(3) of the Code. Following the meeting, I called the Deputy Secretary of the Treasury and suggested that Treasury might wish to review the Bob Jones and Goldsboro cases as they involved significant policy issues.

About two weeks later, a draft of a brief on the merits to be filed in the Bob Jones and Goldsboro cases, prepared by the Solicitor General's office, was delivered to the Treasury Department for its review and comments. Consultations with Treasury and IRS officials regarding the brief were held. As a result of those discussions, it was agreed that further work should be done on the draft brief to state more precisely the legislative basis for the IRS' assertion of authority to deny tax exemptions on public policy grounds when

racial discrimination is involved. Our objective was to determine whether a principled argument could be made to support denial of tax exemptions to private schools engaging in racial discrimination without significant risk of inviting denials of exemptions for a variety of other reasons as exercises of unfettered administrative discretion not authorized by Congress. This effort was undertaken on a coordinated basis by the Tax Division and the Solicitor General's office.

Another draft of the brief was forwarded to the Department of the Treasury on December 29, 1981. After reviewing it, Mr. Reynolds, I and others remained unpersuaded by the legal arguments advanced. It was our opinion that such arguments were not sufficient to justify denial of tax exemptions because of race discrimination without also empowering the Internal Revenue Service to deny exemptions for a host of other social policy reasons. Deputy Secretary McNamar advised me that his independent review of the draft brief resulted in the same reservations.

At that point, I asked Assistant Attorney General Reynolds to prepare a written analysis of the relevant legal and policy considerations in support of his position. He submitted a lengthy memorandum on the morning of January 6, 1982, copies of which have been provided to the Committee, addressing the relevant legal points and concluding that the IRS practice since 1970 was unauthorized under Section 501(c)(3). Simultaneously, the Solicitor General's office completed its work on the draft brief arguing the other side of the issue. The memorandum and draft brief were furnished to Treasury.

As it became apparent that the analyses undertaken by the Department of Justice and the Department of Treasury might eventuate in the Government's change of legal position in the Bob Jones and Goldsboro cases, two meetings were held with White House Counsel to review this probable development. On December 22, 1981, Department of Treasury officials met with the White House Counsel to discuss the policy decision under consideration regarding IRS authority. On December 30, both Justice Department and Treasury officials met with the White House Counsel to relate the probable changes in legal and policy positions in Bob Jones and Goldsboro.

Because both Departments foresaw that heated public criticism and protest might accompany a change of an eleven-year litigating and policy position in the pending Supreme Court cases, reviewing them with the White House Counsel and discussing the legal and policy analyses conducted by the Justice and Treasury Departments was entirely appropriate.

On January 6, 1982, the Attorney General held a two and one-half hour meeting during which all the legal arguments for and against the claimed IRS authority were presented by those in the Department who had worked on the issue. That meeting was attended by representatives of the Solicitor General's office and Tax Division, Mr. Reynolds, Mr. Olson, Assistant Attorney General of the Office of Legal Counsel, and members of the Attorney General's staff and my staff. At that meeting, it was determined that the

Department of Justice should advise the Department of the Treasury that our legal analysis led us to conclude that the IRS practice lacked statutory authority.

Following receipt of the legal advice of the Department of Justice and the policy recommendations of his officials, the Deputy Secretary of the Treasury decided that the tax exemptions to Bob Jones University and Goldsboro schools had been wrongfully denied and should be granted.

On January 8, 1982, the Attorney General, Brad Reynolds and I met with Secretary Regan and other Treasury officials to discuss the announcement of the Treasury decision. Later the same day, the Department of Justice, in accordance with the decision, filed a Memorandum with the Supreme Court, noting the intent of the Internal Revenue Service to revoke the relevant Revenue Rulings in this area and to grant tax exemptions to Bob Jones University and to Goldsboro, and urging that their cases be dismissed on the ground of mootness and that the decisions of the Fourth Circuit Court of Appeals be vacated.

On January 12, 1982, the White House announced that it would seek the legislation necessary to empower the Internal Revenue Service to deny tax exemptions to schools that discriminate on account of race, and, on January 18, 1982, proposed legislation was submitted to the Congress by the President.

Pursuant to a request by the Treasury Department, on January 29, 1982, we forwarded to Treasury an analysis of legal authorities which I now ask be included in the record of this hearing. This analysis restates the written and oral advice the Justice Department gave to the Treasury late in December and the first week of January. We also address in the analysis certain collateral legal questions which arose in the aftermath of the January 8 decision.

During the course of the Department's deliberations on the legal questions raised in the Bob Jones and Goldsboro cases, letters were received from Congressman Trent Lott expressing interest and views on the matter. In April 1981, Congressman Lott sent a letter to the Attorney General in which he urged the Department to reverse the legal position it advanced in the court of appeals in the Bob Jones case. On behalf of the Attorney General, I responded to Congressman Lott and informed him that the Department intended to acquiesce in the grant of certiorari in the Bob Jones case.

On October 30, 1981, Congressman Lott sent another letter to the Attorney General in which he advanced several legal reasons for the Department to reverse its legal position in the Bob Jones litigation. On December 15th, I informed the Congressman by letter that the United States would continue to argue in support of IRS authority to deny tax exemptions on the ground of federal public policy since the Department of Treasury, the client in the case, had not decided otherwise.

On December 21, 1981, I received a letter from Congressman Lott again urging that the Department of Justice reconsider its legal position in the Bob Jones case. Attached to that letter was what appeared to be a page from the President's correspondence log indicating the concurrence of the President with the views of Congressman Lott.

As with countless controversial cases involving the United States, the Department of Justice was aware of the views and concerns voiced by Members of Congress and others in the Bob Jones and Goldsboro litigation. On the other hand, the Department of Justice is entrusted with the responsibility of faithfully executing the laws and interpreting the Constitution and statutes. It would be a breach of this obligation if the Department of Justice were to depart from an objective legal analysis for political or other reasons. I can assure this Committee that the decision made by the Department to advise the Treasury Department that the Internal Revenue Service lacked authority to deny tax exemptions on the ground of federal public policy was made solely on the basis of objective legal analysis.

Mr. Chairman, I cannot state emphatically enough that this decision was compelled by the Department's view of the law -- specifically Section 501(c)(3) of the Internal Revenue Code of 1954. The pertinent language of Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . ." 26 U.S.C. Sec. 501(c)(3) (emphasis added). That language was interpreted by the three-judge federal district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), as requiring organizations satisfying any of the enumerated purposes also to be "charitable" in the common-law sense -- that is, in the sense that the organization's purposes and practices must accord with public policy -- in order to qualify for tax-exempt status. Green was summarily affirmed by the Supreme Court. Coit v. Green, 404 U.S. 997 (1971). However, summary affirmances traditionally have little precedential value, and in this instance, as the Supreme Court has itself subsequently noted, the special circumstances involved in Green made the summary affirmance of no binding significance.1/

1/ The Service's 1970 reinterpretation of Section 501(c)(3) was spurred by the Green litigation. In Green, parents of black public school students sued to enjoin the United States from according tax-exempt status under Sec. 501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Sec. 501(c)(3), but it reversed its position prior to entry of the district court's

Thus, the core question remained unresolved: did Congress intend by enactment of Section 501(c)(3) to authorize the Internal Revenue Service to withhold tax-exempt status from otherwise qualified organizations based on the organizations' adherence to practices deemed by the Service to conflict with public policy. As set forth in detail in the analysis of legal authorities submitted today, an examination of congressional intent has led the Department of Justice to conclude that it did not.

The search for legislative intent begins, of course, with the words of the statute to be construed. Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive with the word "or," manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions. This common-sense interpretation of the language of Section 501(c)(3) is reinforced by the settled canon of statutory construction requiring that related provisions be interpreted in para materia. Sections 503, 504, and 513 of the Code, sister provisions of Section 501(c)(3),

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final decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy" and leaves open in the Supreme Court the question whether Section 501(c)(3) authorizes denial of tax-exempt status to racially discriminatory private schools. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

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reiterate the separate and disjunctive purposes and functions described in Section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. Sections 503(b)(3) (1969), 504(a)(1) and (3) (1969), and 513(a).

Indeed, the regulations promulgated by the Service under Section 501(c)(3) expressly provide that "each of the purposes specified in [Section 501(c)(3)] . . . is an exempt purpose in itself [and] an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . ." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(1)(iii).

Where statutory language is so clear and unambiguous, courts traditionally decline to examine legislative history. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976). We did not end our inquiry with the plain meaning of the Code provision, however. Rather, we undertook a comprehensive review of the legislative history to ascertain whether it revealed support for the proposition that Congress intended to deny tax-exempt status to otherwise qualified organizations deemed by the Internal Revenue Service to violate public policy. We found none.

The provisions now contained in Section 501(c)(3) originated as part of the Tariff Act of 1894, which exempted from taxation organizations "conducted solely for charitable, religious or educational purposes." There is nothing in the legislative history

of this early revenue act, nor in the legislative history of the many subsequent congressional reenactments of this same basic provision, indicating that Congress intended that bona fide "educational" or "religious" organizations must also meet all characteristics of a common-law charity.

To the contrary, the interpretive regulations issued by the Internal Revenue Service in connection with these revenue acts, and followed by the Service for over 50 years, uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense. Not until 1959 did the Internal Revenue Service broaden its regulatory definition of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(2). Even then, however, that same regulation, defines "educational" without any reference to the concept of charity, thus reflecting the Service's pre-1970 view that, although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under Section 501(c)(3).

In sum, Mr. Chairman, we were unable on the most painstaking examination of the statute and its history to find support for the position -- advanced by the IRS for the first time

in 1970 -- that private schools pursuing racially discriminatory policies could be denied a tax exemption. Indeed, the IRS had itself long maintained that such a denial would be unauthorized agency action. It was in fact arguing that very position in Green at the time of its sudden reversal in 1970 on explicit directions from the White House.

Nor could we find evidence of congressional action subsequent to 1970 that suggests ratification by both the House and Senate of the Service's practice in this area over the last eleven years. To the contrary, Congress recently expressed grave reservations concerning the authority of the IRS to deny tax-exempt status to organizations deemed to be in violation of public policy. Sponsors in both the House and the Senate of the Ashbrook Amendment to the Treasury, Postal Service and General Government Appropriations Act of 1980 maintained that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory practices. In barring the prospective use of funds for such purposes in the Ashbrook Amendment, Congress made it abundantly clear that it was leaving undisturbed the status quo with regard to denials of tax exemptions between 1970 and 1978 so as to provide a full opportunity for the legislature to consider the correctness of the Service's interpretation of Section 501(c)(3). By no conceivable stretch of the imagination can this legislative activity in connection with a rider to an

appropriations bill be regarded as approval or ratification of the very construction of Section 501(c)(3) that was at the time being so roundly criticized.

The legal conclusion seemed to us, Mr. Chairman, to be inescapable. Congress intended -- as deduced from the statute's language and legislative history, the Service's interpretive regulations, and subsequent congressional activity -- that Section 501(c)(3) exempt from income taxation "educational" organizations that are not also "charitable" as surely as it exempts "charitable" organizations that are not also "educational." The contrary construction accorded the statute by the district court in Green and the Fourth Circuit Court of Appeals in Bob Jones and Goldsboro does a disservice to the most basic canons of statutory construction and we cannot in good conscience support that position.

In reaching this conclusion, we looked as well at Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, to determine whether the grant of a tax exemption to a private school that racially discriminates would violate that federal statute. As you know, Mr. Chairman, Title VI prohibits racial discrimination under any program or activity "receiving Federal financial assistance," and the claim has been made by some that a tax exemption can be regarded as such assistance.

Quite frankly, this contention is wholly without merit. Title VI defines "Federal financial assistance" in terms of specified generic types of aid: grants, loans and contracts other than contracts of insurance or guaranty. None of these categories, understood in their ordinary sense, includes tax exemptions. This is underscored by the legislative history of the 1964 Act, which includes considerable discussion of the types of federal funding that would bring a program or activity within Title VI coverage and nowhere mentions tax exemptions as triggering such a result.

There is one district court case, McGlotten v. Connally, 338 F. Supp. 448 (1972), that equates tax exemptions with "Federal financial assistance." In reaching that result, the district court conceded that its conclusion found no support in either the language, agency interpretations, or the legislative history of Title VI. Nonetheless, it held that the "plain purpose" of the statute to promote nondiscrimination was sufficient to override the plain language and one-sided legislative history.

The logic of such reasoning has far-reaching ramifications. In essence, the district court in McGlotten viewed a tax exemption as a government subsidy, inexplicably equating it with a distribution of federal funds. If this view were to prevail, essentially all property and earnings of private parties would effectively belong to the government and a failure of Congress to tax would constitute

federal financial assistance. The Supreme Court explicitly rejected that concept in Walz v. Tax Commission, 397 U.S. 664, 675 (1970), holding that a state tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organizations. In our view, Walz is a complete answer to the Title VI assertion made in the McGlotten decision.

Having reached the conclusion that an argument to support the interpretation that had been given to Section 501(c)(3) since 1970 should not be advanced in the Supreme Court, we felt compelled to recommend to the Treasury Department that it no longer pursue that course. There was clear recognition at both the Department of Justice and the Department of the Treasury that such a reversal of position would likely be misunderstood and mischaracterized by many as encouragement, or at the very least tolerance, on the part of the government of what are sometimes referred to as "segregation academies." When confronted with the identical politically explosive issue in 1970, the Nixon Administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified.

This Administration, Mr. Chairman, has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to principle over political

expediency. As a consequence, decisions have been made, and policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounded on high principle. This is but another example of the Administration's commitment to that approach.

Here, the principle involved is among the most fundamental to our system of democratic government. The first sentence of the Constitution declares: "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." This provision, and similar grants of power to the Executive and Judicial Branches in Articles II and III of the Constitution, reflect a scheme of checks and balances integral to freedom and ordered liberty. Under Article II of the Constitution, once the meaning of a law is discerned, the Executive is charged with its faithful execution.

The Internal Revenue Service's practice since 1970 of denying tax exemptions to private schools that discriminate runs directly counter to that constitutional scheme. It opens the door for administrative agencies to "legislate" by administrative fiat, and, without guidance from Congress, to make fundamental policy decisions that impact directly on every citizen in this country. Such transgressions by the Executive on Congressional prerogatives are most inviting where the end being sought -- i.e., the removal of racial discrimination in our educational institutions -- is a common objective to which all

Branches of Government subscribe. But, it is in precisely such circumstances that we must be sure that principle wins out over emotion, no matter how difficult the decision may be.

Mr. Chairman, the power to grant or deny exemptions from taxation is legislative in nature. Congress has not yet authorized the Internal Revenue Service to withhold exemptions from private schools on the ground that they practice racial discrimination. The President has forwarded to the Congress legislation that would grant the IRS such authority. He has asked that you give this matter the very highest priority and enact the legislation as rapidly as possible.

This Administration is concerned with, and sensitive to, minority interests and civil rights concerns. In enforcing the many federal statutes that afford protections in this as well as other areas, we must, of course, uncompromisingly discharge our responsibility to uphold the Constitution and laws of this land. That responsibility cannot be carried out faithfully, and with full integrity, if we allow administrative agencies, no matter how well intended, to act on their own in seeking to achieve even the most laudable ends.

That was the fundamental issue in the Bob Jones and Goldsboro cases, and it was for the reasons that I have stated that the Department of Justice concluded as a matter of law, notwithstanding our repugnance for the racially discriminatory practices of the two schools, that the IRS practice since 1970 could no longer be supported.

Mr. Reynolds and I will be glad to answer any questions you may have.

STATEMENT OF R. T. McNAMAR, DEPUTY SECRETARY, DEPARTMENT OF THE TREASURY

The CHAIRMAN. We will hear from Mr. McNamar, and then we will have questions.

Mr. MCNAMAR. Thank you, Mr. Chairman. With me from the Treasury Department is our General Counsel, Peter Wallison. We are pleased to appear before the committee to present the views of the Treasury on the administration's bill. This bill would deny the benefits of tax-exempt status to organizations maintaining private schools that follow racially discriminatory practices.

Indeed, in light of the controversy that has developed in this area in recent weeks, we are especially pleased to have an opportunity to dispel some of the confusion and misconceptions regarding the policy of this administration both with respect to racially discriminatory schools and the appropriate role of the Internal Revenue Service.

At the outset, we wish to emphasize the following points: The Reagan administration is unalterably opposed to racial discrimination in any form. And further, and particularly with response to Senator Matsunaga's comments earlier, the administration endorses in the strongest fashion the principles of *Brown* v. *Board of Education*, that racial discrimination in education has no place in a free society and should not in any way be tolerated or encouraged by the Government.

Thus, the administration believes that racially discriminatory schools, and the organizations that maintain them, should not be recipients of tax-deductible contributions. However, we recognize that protection must be accorded to the legitimate exercise of religious beliefs.

While the administration believes that the benefits of tax exemption should be denied to racially discriminatory schools, it also believes that such a position must be based on statute. However popular it would have been to come out the other way, we and the Justice Department are unable to find that Congress has yet authorized such action in the Internal Revenue Code.

It is not satisfactory to say that the tax laws permit the Internal Revenue Service to require that tax-exempt organizations must comply with certain fundamental public policies. If we follow this approach, at any time the Service may go beyond racial discrimination and decide that some other public policy—such as discrimination based on sex—requires the revocation of tax exemptions for schools that admit only women. Instead, we believe that Congress should authorize the denial of tax exemption based only on racial discrimination by passing a law to this effect. That is why the administration has submitted the bill that is before this committee today.

Against this background, I would like to discuss in some detail three specific areas that are of appropriate interest to the Congress and the American public. They are: (1) The chronology of events in reaching the joint Treasury and Justice decision not to file a brief in support of the position of the Internal Revenue Service before the Supreme Court; and (2) the rationale for this decision; and (3) a discussion of the administration's legislation.

First, the chronology of events. Although it is unusual for any agency to recount in detail the events which led to a particular legal or policy decision, Congress has indicated a desire to inquire into this matter and there have been allegations that the decision was the result of a political choice. On the contrary, as the chronology of events will show, the decision was made as a result of the careful, thorough legal analysis, and was made despite a recognition of the politically unpopular nature of that decision. In fact, the events show that the Treasury and Justice Departments hoped to be persuaded that the Service's policy of administratively denying tax exemptions to schools that racially discriminate was supportable.

The decision announced on January 8 was not an easy one and in my view presented an issue that should have been confronted in 1970 when the Service, at the request of the Nixon White House, adopted a position which was then being advanced by the plaintiffs in the first *Green* case. In that case, plaintiffs argued that the Service was authorized to deny tax exemptions to racially discriminatory schools because all tax-exempt entities had to be charitable within the common law sense and as such had to pursue certain fundamental public policies. One of these fundamental public policies was nondiscrimination on the ground of race.

As Senator Moynihan points out, in adopting the position of the plaintiffs in *Green* v. *Connally* in 1970, the Service achieved a satisfactory outcome in that particular case. It could deny tax exemption to racially discriminatory schools but there was a far broader issue involved which was not adequately considered at that time. If the Service could require tax-exempt schools to follow a policy of racial nondiscrimination, could it also impose other policies on the ground that they, too, were Federal public policies? In other words, did this legal principle establish a basis for IRS actions which went well beyond the laudable objectives of prohibiting racial discrimination?

After 11 years, when it came time for a subsequent administration to file a brief in the Supreme Court endorsing the legal theory adopted by the Service in 1970, that issue had to be faced squarely. In December 1981, as the time for filing a Supreme Court brief approached, the question could no longer be avoided, and after extensive review of the law, the Treasury and Justice Departments were compelled to conclude the theory adopted by the Service in 1970 could not be rationalized under existing statutes on either a legal or a policy basis, because it would confer on the Service a breadth of discretion that no administrative agency should have.

The decision to grant Bob Jones University its tax exemption was made as a matter of policy and law, and involved politics only in its broadest and best sense—the mandate of the Reagan administration to assure that the Government of the United States acts responsibly and in accordance with the laws enacted by the Congress. Let me summarize what the chronology of events shows and be sure to include all my contacts with the White House.

I first became aware that there was a concern over the Government's legal position in the *Bob Jones* case when Deputy Attorney General Schmults called me on the evening of December 8 and asked if I were aware of the *Bob Jones* case. I indicated I knew of

its existence, and that it involved tax-exempt status for religious schools that practiced racial discrimination. He indicated that the Justice Department was reviewing the legal papers it was preparing for the Supreme Court on December 31. He asked that I look into the matter because it involved important policy issues and get back to him when I had done so.

I subsequently informed Secretary Regan about the Justice Department's concern in the *Bob Jones* case sometime during the week of December 14, at one of the many frequent meetings we have during any given week. He did not suggest that I come to any particular conclusion. Rather, he indicated he wanted to be kept fully apprised over Christmas vacation.

As we reviewed our legal basis for our position, the Treasury began to have concerns about the policy issues which were then under review in the Justice Department. However, in an effort to continue supporting the Service's position, we agreed to postpone any decision until we had all had a chance to read the brief being prepared by the Solicitor General's office. About this time, I informed Fred Fielding, White House Counsel, of our growing concern about the case and the Government's position. I later met with him in his office on December 22 to explore the legal problems of the case, and indicated that we were awaiting the Solicitor's brief supporting the Service.

Subsequently, on Monday, December 28, Secretary Regan informed me that Ed Meese wished to be apprised of the case. That afternoon, I phoned Meese and told him that I was concerned about our position; that we had informed Fielding and that we all recognized the political sensitivity of taking a legal position that might be construed as contrary to the administration's policy against racial discrimination. He pressed me to be sure that the Justice and Treasury Departments were absolutely comfortable with their position on the law before taking any action. I indicated that we were waiting for the Justice Department's draft brief supporting the IRS position before we made any decision.

On the evening of December 23, I read the initial Justice Department draft of the brief for the Supreme Court. The brief supported the IRS position that it had authority to deny tax exemptions. I was unpersuaded by the logic or the legal citation. I then asked for a second draft brief narrowed to the issue of racial discrimination. However, this second draft, which I received on December 29, was still based on the theory that the Service could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax-exempt status. Given two tries, there apparently was no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemption on other grounds.

I, therefore, concluded that the Treasury could no longer support the IRS on this matter because the Government would be required to take a position in the Supreme Court that we simply did not regard as being either supported by statutory authority or adequately determined by the relevant case law and appropriate policy.

On December 30, the Deputy Attorney General, the Assistant Attorney General for Civil Rights, and I met with Fred Fielding and

others to tell Fielding of Treasury's preliminary decision. I talked to Secretary Regan in person on December 28, and by telephone on December 30. At no time during this process did either Fielding or Regan attempt to influence my judgment of the legal issues in the case or order me to reach any particular conclusion. I also had no contact with any Congressmen or Senators in making this decision.

In an effort to be certain that the Department of Justice and Treasury were legally correct on the matter of such important national policy, we requested a 1-week extension from the Supreme Court, and reviewed the matter several times with the Commissioner, the Chief Counsel of the IRS, the Treasury Department's Office of Tax Policy, and the Justice Department. During this period, a number of the initial thoughts in our discussions were reduced to a draft memorandum by the Department of Justice, the unsigned, undated copy of which has been furnished to the committee. And the final decision was made on January 8.

This additional time permitted a thorough review of my decision by all the relevant senior officials in the Justice and Treasury Departments who might have a perspective on the case. By January 8, we were ready to announce our decision. Since we could not support the Service's position before the Supreme Court, there was no choice but to grant the tax exemptions which were a subject of the suit. I was out of Washington, and by phone I directed the Commissioner of Internal Revenue to take the actions necessary to grant these exemptions. Since the case before the Supreme Court was now moot, the Justice Department filed a memorandum with the Supreme Court seeking to have the court vacate its jurisdiction.

I would now like to talk about the rationale for the Treasury decision. The decision announced on January 8, 1982, had its origins in a policy determination by the Nixon White House in 1970. That decision directed the Service to accede to the position of the plaintiffs in the first *Green* case in the Federal District Court. This reversed the longstanding IRS opposition to involving the administration of the tax laws in the controversy surrounding racial discrimination. Although this decision advanced a laudable goal, the 1970 decision was not soundly based on statutory law. And the consequences of this expedient approach were finally recognized in late 1981 when the Treasury Department was required to approve the Justice brief which articulated the legal rationale adopted in 1970. In fact, I would raise a question as to why no legislation was submitted in 1970. And I presume that Senator Moynihan's helpful recitation indicates that there was simply not time before the schools were to open that fall to propose legislation. But he may be able to elaborate on that.

Senator MOYNIHAN. Mr. Chairman, which I shall do when the time comes.

Mr. MCNAMAR. The Justice Department had prepared and delivered to the Treasury Department a memorandum of law which describes the legal deficiencies in the Service's position. As the Justice Department memorandum concludes, there is no adequate basis in law for the Service's position that it has the authority to select certain Federal public policies and impose these policies on tax-exempt organizations. Nor is there a legal basis for concluding that the IRS has the statutory authority to invoke section 501(3)(c)

and the attendant denial of deductions under section 170 to any school or university that violates the civil rights laws. The Justice Department's memo makes it clear that there is no statutory language or congressional direction, no legislative history, and no definitive Supreme Court opinion that authorizes or requires the IRS to revoke the tax exemption of schools that do not comply with the Federal public policy, or otherwise violate the civil rights laws.

The committee should note that there is no question that the Internal Revenue Service was under tremendous pressure to adopt the view it took in 1970. And has acted professionally and responsibly. However, the public policies rationale that the Service adopted was a post hoc legal justification for a prior policy action.

In making the Treasury's policy decision, we were faced with a classic moral dilemma. Do the ends justify the means? That is, does the attainment of a good end or objective, eliminating discrimination, justify the endorsement of a theory that we regarded as unauthorized by law. This ethical dilemma has been long settled in all civilized societies. The answer is "no."

In addition, in the United States, we have consistently adhered to the trite-sounding but immutable principle that we will have a government of laws and not of men. And that is what this matter is all about. Should administrators and executors of the law be free to define public policy in the absence of legislative authority duly enacted by Congress? Again, the answer is "no."

The implications of continuing the policy of allowing the IRS to determine on its own those public policies denying tax exemption was well stated by the district court in the *Bob Jones* case. There, the judge pointed out that section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend Federal public policy. Voicing apprehension over such broad power, the district court observed:

> Federal public policy is constantly changing. When can something be said to become a Federal public policy? Who decides? With a change of Federal public policy, the law would change without congressional action, a dilemma of constitutional proportion. Citizens could no longer rely on the law of section 501(c)(3) as it is written but then would rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny.

For example, if we were to endorse the theory on which the Service was proceeding before the Supreme Court, what would prevent the Service from revoking the tax-exempt status of Smith College, a school opened to only women? Does sex discrimination violate a clearly enunciated public policy? Apparently someone in the State of Massachusetts thinks so because litigation on this issue is currently going forward in the State courts of Massachusetts.

What about religious organizations that refuse to ordain priests of both sexes? And could the Commissioner decide that if Black Muslim organizations refused to admit whites, they should be denied a tax-exempt status because they discriminate?

Further, should the IRS Commissioner be permitted, in the absence of legislation, to determine what is national policy on abortion? Should hospitals that refuse to perform abortions be denied their tax-exempt status? Or reading Federal policy another way,

should hospitals that do perform abortions be denied their tax-exempt status?

These extremely difficult but real issues illustrate the need for congressional action on the question of tax-exempt schools which discriminate on the basis of race. Here we do have a national consensus which should be embodied in statute so that the Internal Revenue Service has appropriate guidance. To leave the judgment solely to the Service is not the responsible course of action.

It is simply because these issues are so difficult and so fundamental to our society that they should not be left to administrative determinations by employees of the Federal Government, but rather should be determined by the elected representatives of the American people. It is for this reason that the administration has developed and proposed the administration's bill which is designed to give a clear congressional mandate on these matters.

Thus, the administration urges Congress to exercise its authority and responsibility to provide guidance on these matters so that there will be a basis in law to deny tax-exempt status to educational institutions that discriminate on the basis of race.

Finally, I would like to turn to a description of the administration's bill, which is before the committee this morning. Section one of that bill directly addresses the issue before us. Specifically, a new section, 501(j), would be added to the Internal Revenue Code to deny 501(c)(3) treatment and 501(a) treatment if the school practices racial discrimination.

Failure to be described in section 501(c)(3) also means that the organization is not within the exemptions from Federal social security and employment taxes provided in the code. Correlative changes are made in the income, estate and gift tax deduction sections to provide that no deduction will be allowed for contributions to such organizations.

The organizations covered are defined in new section 501(j)(1) to include those that maintain a regular faculty and curriculum and normally have a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. In general, this is the same definition as appears in code section 170(b)(1)(a)(ii), and parallels the class of schools covered by the IRS' previously published procedures.

Further, consistent with Revenue Ruling 75–231, the definition covers all organizations maintaining these schools.

New code section 501(j)(2) defines racially discriminatory policy. Generally under the bill, the school has a policy if it refuses to admit students of all races (define and include also color and national origin) to the rights, privileges, programs, and activities usually accorded or made available to students by that organization. Or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, or other programs in a manner that does not discriminate on the basis of race. This definition usually conforms to that first established by the Court in the *Green* litigation and carried forward by the IRS in Revenue Ruling 71-447 and subsequent pronouncements.

Additionally, section 501(j)(2) contains an explicit provision in recognition of the legitimate interest of religious-based schools. Thus, under the bill, an admissions policy or program of religious

training or worship that is limited to or grants preference or priority to members of a particular religious organization or belief would not be considered a racially discriminatory policy. Thus, schools may confine admission and training to persons of a particular religion. The protection, however, will not apply if the policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race. Pursuant to this rule, we expect that *Bob Jones* and *Goldsboro* would be denied their tax-exempt status if they continue their past racial practices.

To insure that the express congressional sanction does not grant a windfall to discriminatory schools and their contributors, previously denied the benefits of exemption, the legislation applies retroactively to July 10, 1970, the date the IRS first announced it would not grant exemption to private schools with discriminatory policies. We believe that a retroactive effective date is essential to preserve the national policy of denying tax exempt status to schools that racially discriminate, and that the retroactivity is constitutional.

Finally, the bill contemplates that present procedures, that is administrative procedures, regarding grant or denial of tax exemption will remain in place. Thus, a nonexempt organization must generally submit to the IRS an application requesting recognition of exemption together with supporting material enabling the IRS to rule on all relevant issues including racial discrimination. Organizations whose exemptions have been recognized will be subject to periodic examinations to insure continuing compliance with all applicable requirements.

If discrimination is found to exist, revocation will be proposed and advance assurance of deductibility of contributions will be suspended. Thereafter, the organization will be accorded substantial administrative appeal, including review by the national Office. If the finding of discrimination is sustained, exemption will be revoked and the organization, of course, has the opportunity to seek judicial review.

We have proposed this legislation to deal with the immediate need to empower the Internal Revenue Service with unmistakable authority to deny tax exemption to racially discriminatory schools. We recognize that it will not resolve the difficult definitional problems faced by the Internal Revenue Service in giving meaning to such general terms as charitable and educational, and we invite further congressional action to define better standards in those areas as well. We will, pending such action, continue to support the Internal Revenue Service in applying the 1959 regulations in the charitable area and in its efforts to deny exemption to those organizations engaged in illegal activities.

This concludes my testimony.

[The prepared statement follows:]

For Release Upon Delivery

Expected 10:30 a.m. EST

STATEMENT OF
THE HONORABLE R.T. MCNAMAR
DEPUTY SECRETARY OF THE TREASURY
BEFORE THE SENATE FINANCE COMMITTEE
FEBRUARY 1, 1982

Mr. Chairman and Members of the Committee:

With me from the Treasury Department is our General Counsel, Peter J. Wallison.

We are pleased to appear before the Committee to present the views of the Treasury on the Administration's bill. This bill would deny the benefits of tax exempt status to organizations maintaining private schools that follow racially discriminatory practices.

Indeed, in light of the controversy that has developed in this area in recent weeks, we are especially pleased to have an opportunity to dispel some of the confusion and misconceptions regarding the policy of this Administration both with respect to racially discriminatory schools and the appropriate role of the Internal Revenue Service.

At the outset, we wish to emphasize the following points:

The Reagan Administration is unalterably opposed to racial discrimination in any form. Further, the Administration endorses, in the strongest fashion, the principles of Brown v. Board of Education, that racial discrimination in education has no place in a free society and should not in any way be tolerated or encouraged by the Government.

Thus, the Administration believes that racially discriminatory schools, and the organizations that maintain them, should not be recipients of tax deductible contributions. However, we recognize that protection must be accorded to the legitimate exercise of religious beliefs.

While the Administration believes that the benefits of tax exemption should be denied to racially discriminatory schools, it also believes that such a position must be based on statute. However popular it would have been to come out the other way, we and the Justice Department are unable to find that Congress has yet authorized such action in the Internal Revenue Code.

It is not satisfactory to say that the tax laws permit the Internal Revenue Service to require that tax exempt organizations must comply with certain fundamental public policies. If we follow this approach, at any time the Service may go beyond

racial discrimination and decide that some other policy -- such as discrimination based on sex -- requires the revocation of tax exemptions for schools which admit only women. Instead, we believe that Congress should authorize the denial of tax exemption based only on racial discrimination by passing a law to this effect. That is why the Administration has submitted the bill that is before this Committee today.

Against this background, I would like to discuss in some detail three specific areas that are of appropriate interest to the Congress and the American public. They are:

1. The chronology of events in reaching the joint Treasury and Justice decision not to file a brief in support of the position of the Internal Revenue Service before the Supreme Court.

2. The rationale for this decision.

3. A discussion of the Administration's legislation.

CHRONOLOGY OF EVENTS

Although it is unusual for any agency to recount in detail the events which led to a particular legal or policy decision, Congress has indicated a desire to inquire into this matter and there have been allegations that the decision was the result of a political choice. On the contrary, as the chronology of events will show, the decision was the result of a careful, thorough legal analysis, and was made despite a recognition of the politically unpopular nature of that decision. In fact, the events show that the Treasury and Justice Departments hoped to be persuaded that the Service's policy of administratively denying tax exemptions to schools that racially discriminate was supportable.

The decision announced on January 8 was not an easy one and in my view presented an issue that should have been confronted in 1970 when the Service, at the request of the Nixon White House, adopted a position which was then being advanced by the plaintiffs in the first Green case. In that case, plaintiffs argued that the Service was authorized to deny tax exemptions to racially discriminatory schools because all tax exempt entities had to be "charitable" in the common law sense amd as such had to pursue certain fundamental public policies. One of these fundamental public policies was non-discrimination on the grounds of race.

In adopting the position of the plaintiffs in Green v. Connally, the Service achieved a satisfactory outcome in that particular case; it could deny tax exemptions to racially

discriminatory schools. But there was a broader issue involved, which was not adequately considered at the time. If the Service could require tax exempt schools to follow a policy of racial non-discrimination, could it also impose other policies on the ground that they too were Federal public policies? In other words, did this legal principle establish a basis for IRS actions which went well beyond the laudable objective of prohibiting racial discrimination?

After eleven years, when it came time for a subsequent Administration to file a brief in the Supreme Court endorsing the legal theory adopted by the Service in 1970, that issue had to be faced squarely. In December 1981, as the time for filing a Supreme Court brief approached, the question could no longer be avoided, and after extensive review of the law the Treasury and Justice Departments were compelled to conclude the theory adopted by the Service in 1970 could not be rationalized under existing statutes on either a legal or a policy basis, because it would confer on the Service a breadth of discretion that no administrative agency should have.

The decision to grant Bob Jones University its tax exemption was made as a matter of policy and law, and involved politics only in its broadest and best sense -- the mandate of the Reagan Administration to assure that the Government of the United States acts responsibly and in accordance with the laws enacted by Congress. Let me summarize what the Chronology of Events shows and include all my contacts with the White House.

I first became aware that there was a concern over our legal position in the Bob Jones case when Deputy Attorney General Ed Schmults called me on the evening of December 8 and asked if I were aware of the Bob Jones case. I indicated I knew of its existence and that it involved tax exempt status for religious schools that practiced racial discrimination. He indicated that the Justice Department was reviewing the legal papers it was preparing for the Supreme Court on December 31. He asked that I look into the matter because it involved important policy issues and get back to him.

I subsequently informed Secretary Regan about the Justice Department's concerns in the Bob Jones case sometime during the week of December 14, at one of the frequent meetings we have during any given week. He did not suggest that I come to any particular conclusion. Rather, he indicated he wanted to be kept apprised over the Christmas vacation.

As we reviewed the legal basis for our position, the Treasury began to have concerns about the policy issues which were then under review in the Justice Department. However, in an effort to continue supporting the Service's position, we agreed to postpone any decision until we all had a chance to read the brief being prepared by the Solicitor General's office. About this time, I informed Fred Fielding, White House Counsel, of our growing concern about the case and the government's position. I later met with him in his office, on December 22, to explore the legal problems of the case, and indicated we were awaiting the Solicitor's brief supporting the Service.

Subsequently, on Monday, December 28, Secretary Regan informed me that Ed Meese wished to be apprised of the case. That afternoon I phoned Meese and told him that I was concerned about our position, that we had informed Fielding and that we all recognized the political sensitivity of taking a legal position that might be construed as contrary to the Administration's policy against racial discrimination. He pressed me to be sure that the Justice and Treasury Departments were absolutely comfortable with their position on the law before taking any action. I indicated that we were waiting for the final Justice Department draft brief supporting the IRS position before we made any decision.

On the evening of December 23, I read the initial Justice Department draft of the brief for the Supreme Court. The brief supported the IRS position that it had authority to deny the tax exemptions. I was unpersuaded by the logic or the legal citations. I then asked for a second draft brief narrowed to the issue of racial discrimination. However, the second draft, which I received on December 29, was still based on the theory that the Service could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax exempt status. Given two tries, there was apparently no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemptions on other grounds.

I, therefore, concluded that the Treasury could no longer support the IRS on this matter, because the Government would be required to take a position in the Supreme Court that we simply did not regard as being either supported by statutory authority or adequately determined by the relevant case law and appropriate policy.

On December 30 the Deputy Attorney General, the Assistant Attorney General for Civil Rights and I met with Fred Fielding and others to tell Fielding of Treasury's preliminary decision. I talked to Secretary Regan in person on December 28 and by telephone on December 30. At no time during this process did either Fielding or Regan attempt to influence my judgment of the legal issues in the case or order me to reach any particular conclusion. I also had no contact with any Congressmen or Senators in making this decision.

In an effort to be certain that the Departments of Justice and Treasury were legally correct on a matter of such important national policy, we requested a one-week extension from the Supreme Court and reviewed the matter several times with the Commissioner and the Chief Counsel of IRS, the Treasury Department's Office of Tax Policy and with the Justice Department.

During this period, a number of the initial thoughts in our discussions were reduced to a draft memorandum by the Department of Justice -- the unsigned, undated copy of which has been furnished to this Committee -- and the final decision was made on January 8. This additional time permitted a thorough review of my decision by all the relevant senior officials in the Justice and Treasury Departments who might have a perspective on the case. By January 8 we were ready to announce our decision. Since we could not support the Service's position before the Supreme Court, there was no choice but to grant the tax exemptions which were the subject of the suit. I was out of Washington and by phone I directed the Commissioner of Internal Revenue to take the actions necessary to grant these exemptions. Since the case before the Supreme Court was now moot, the Justice Department filed a memorandum with the Supreme Court seeking to have the court vacate its jurisdiction.

RATIONALE FOR TREASURY DECISION

The decision announced on January 8, 1982, had its origins in a policy determination by the Nixon White House in 1970. That decision directed the Service to accede to the position of the plaintiffs in the first Green case in the Federal District Court. This reversed the long-standing IRS opposition to involving the administration of the tax laws in the controversy surrounding racial discrimination. Although this decision advanced a laudable goal, the 1970 decision was not soundly based on statutory law and the consequences of this expedient approach were finally recognized in late 1981 when the Treasury Department was required to approve the Justice Department brief which articulated the legal rationale adopted in 1970.

The Justice Department has prepared and delivered to the Treasury Department a memorandum of law which describes the legal deficiencies in the Service's position. As the Justice Department memorandum concludes, there is no adequate basis in law for the Service's position that it has the authority to select certain Federal public policies and impose these policies on tax exempt organizations. Nor is there a legal basis for concluding that the IRS has the statutory authority to invoke Section 501(c)(3) and the attendant denial of deductions under Section 170 to any school or university that violates the civil rights laws. The Justice Department memo makes clear that there is no statutory language or Congressional direction, no legislative history, and no definitive Supreme Court opinion, that authorizes or requires the IRS to revoke the tax exemptions of schools that do not comply with Federal public policy or otherwise violate the civil rights laws.

The Committee should note that there is no question that the Internal Revenue Service was under tremendous pressure to adopt the view it took in 1970, and has acted professionally and responsibly. However, the "public policies" rationale the Service adopted was a post hoc legal justification for a prior policy action.

In making the Treasury's policy decision we were faced with a classic moral dilemma. "Does the end justify the means?" That is, does the attainment of a good end or objective (eliminating discrimination) justify the endorsement of a theory that we regarded as unauthorized by law? This ethical dilemma has been long settled in all civilized societies. The answer is "no."

In addition, in the United States we have consistently adhered to the trite-sounding but immutable principle that we will have "a government of laws and not of men," and that is what this matter is all about. Should administrators and executives of the law be free to define "public policy" in the absence of legislative authority duly enacted by Congress? Again, the answer is "no."

The implications of continuing the policy of allowing the IRS to determine on its own those public policies denying tax exemptions was well stated by the district court in the Bob Jones case. There, the judge pointed out that Section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over such broad power, the district court observed: "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action -- a dilemma of constitutional proportions. Citizens could no longer rely on the law of Section 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny."

For example, if we were to endorse the theory on which the Service was proceeding before the Supreme Court, what would prevent the Service from revoking the tax exempt status of Smith College, a school open only to women? Does sex discrimination violate a clearly ennunciated public policy? Apparently someone in the state of Massachusetts thinks so, because litigation on this issue is currently going forward in the state courts of Massachusetts.

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Further, should the IRS Commissioner be permitted -- in the absence of legislation -- to determine what is national policy on abortion? Should hospitals that refuse to perform abortions be denied their tax exempt status? Or, reading Federal policy another way, should hospitals that do perform abortions be denied their tax exempt status?

These extremely difficult but real issues illustrate the need for Congressional action on the question of tax exempt schools which discriminate on the basis of race. Here perhaps we have a national consensus which should be embodied in statute so that the Internal Revenue Service has appropriate guidance. To leave the judgment solely to the Service is not the responsible course.

It is simply because these issues are so difficult and fundamental to our society that they should not be left to an administrative determination by employees of the Federal Government, but rather should be determined by the elected representatives of the American people. It is for this reason that the Administration has developed and proposed the Administration's bill which is designed to give a clear Congressional mandate on these matters.

Thus the Administration urges the Congress to exercise its authority and responsibility to provide guidance on these matters so that there will be a basis in law to deny tax exempt status to educational institutions that discriminate on the basis of race.

DISCUSSION OF LEGISLATION

Finally, I turn to a description of the Administration's bill, which is before the Committee this morning. Section one of that bill directly addresses the issue before us. Specifically, a new Section 501(j) would be added to the Internal Revenue Code to deny 501(c)(3) treatment and 501(a) treatment if the school practices racial discrimination.

Failure to be described in Section 501(c)(3) also means that the organization is not within the exemptions from Federal social security and employment taxes provided in the Code. Correlative changes are made to the income, estate and gift tax deduction sections to provide that no deduction will be allowed for contributions to such organization.

The organizations covered are defined in new section 501(j)(1) to include those that maintain a regular faculty and curriculum and normally have a regularly enrolled body of students in attendance at the place where its educational

activities are regularly carried on. Generally, this is the same definition as appears in Code Section 170(b)(1)(A)(ii), and parallels the class of schools covered by the IRS's prior published procedures. Further, consistent with Rev. Rul. 75-231, the definition covers all organizations maintaining these schools.

New Code Section 501(j)(2) defines "racially discriminatory policy." Generally, under the bill, a school has such a policy if it refuses to admit students of all races (defined to include also color and national origin) to the rights, privileges, programs, and activities usually accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, or other programs in a manner that does not discriminate on the basis of race. This definition generally conforms to that first established by the court in the Green litigation and carried forward by the IRS in Rev. Rul. 71-447 and subsequent pronouncements.

Additionally, Section 501(j)(2) contains an explicit provision in recognition of the legitimate interests of religious-based schools. Thus, under the bill, an admissions policy or a program of religious training or worship that is limited to, or grants preference or priority to, members of a particular religious organization or belief would not be considered a racially discriminatory policy. Thus, schools may confine admission and training to persons of a particular religion. The protection, however, will not apply if the policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race. Pursuant to this rule, we expect that Bob Jones and Goldsboro would be denied their tax exempt status if they continue their past racial practices.

To ensure that the express congressional sanction does not grant a windfall to discriminatory schools and their contributors, previously denied the benefits of exemption, the legislation applies retroactively to July 10, 1970, the date the IRS first announced it would not grant exemption to private schools with discriminatory policies. We believe that a retroactive effective date is essential to preserve the national policy of denying tax exempt status to schools that racially discriminate, and that the retroactivity is constitutional.

Finally, the bill contemplates that present procedures regarding grant or denial of tax exemption will remain in place. Thus, a nonexempt organization must generally submit to the IRS an application requesting recognition of exemption, together with supporting material enabling the IRS to rule on all relevant issues, including racial discrimination. Organizations whose exemptions have been recognized will be subject to periodic examination to ensure continuing compliance with all applicable requirements.

If discrimination is found to exist, revocation will be proposed and advance assurance of deductibility of contributions will be suspended. Thereafter, the organization will be accorded substantial administrative appeal, including review by the National Office. If the finding of discrimination is sustained, exemption will be revoked and the organization, of course, has the opportunity to seek judicial review.

We have proposed this legislation to deal with the immediate need to empower the Internal Revenue Service with unmistakable authority to deny tax exemption to racially discriminatory schools. We recognize that it will not resolve the difficult definitional problems faced by the Internal Revenue Service in giving meaning to such general terms as "charitable" and "educational," and we invite further Congressional action to define better standards in those areas as well. We will, pending such action, continue to support the Internal Revenue Service in applying the 1959 regulations in the charitable area and in its efforts to deny exemption to those organizations engaged in illegal activities.

This concludes my testimony. I will be pleased to answer any questions you may have.

The CHAIRMAN. As I understand, Mr. Wallison and Mr. Reynolds have no statements, but they will be available for questions.

First, I thank both Mr. Schmults and Mr. McNamar for their extensive statements, and I think it is important that their full statements be considered. I think we understand this is a very sensitive issue. We should proceed as carefully and as cautiously as we can to make certain that we do as you have done in your statements and touch everything that has been raised. Of course, there has been a storm of criticism directed at this decision.

As I understand the legislation, as you have just reviewed it, it does not apply to schools that have an exclusively religious curricula. Is that correct?

Secretary MCNAMAR. That is correct, yes, such as a Sunday school.

The CHAIRMAN. Right. Sunday schools and afternoon religious schools are not affected by the legislation. The bill provides, as I understand it, school admission policies or programs of religious training or worship are not deemed discriminatory if they have limitations, preferences or priorities that are based on religious affiliation or belief. That is made explicit in the legislation.

Secretary MCNAMAR. Yes; it is.

The CHAIRMAN. And I think the important point is the bill provides that religious schools discriminating on the basis of race or upon a belief requiring discrimination on the basis of race will be denied their exemption. That is clear in the legislation.

I think the question we need to determine and we hope to determine in this committee is: Is this legislation absolutely necessary to validate the IRS nondiscrimination policy, or is it desirable to further define the standards and procedures rules to be applied?

Mr. SCHMULTS. Our view, Mr. Chairman, is that it is essential that the Congress specifically grant authority to the Internal Revenue Service by an amendment to the Internal Revenue Code to give it the power to deny tax exemptions to racially discriminatory private schools. In our view it is not a "nice-to-have piece" of legislation that would deal only with procedural matters; it really goes to a legislative grant of authority.

The CHAIRMAN. Well, many of us have been discussing this legislation and it occurs to some of us that if this legislation in its present form is passed, the issue that is now before the Supreme Court would be back before the Court in 6 months or 1 year or 2 years from now. Of course, I'm certain the legislation may be amended, who knows? In any case, we ask ourselves what have we gained by posing legislation? Why shouldn't the Court proceed now to decide the *Bob Jones* and the *Goldsboro* cases?

Mr. SCHMULTS. Well, we are not suggesting that this legislation is going to deal with all the issues that may be coming before the Court someday. It clearly will not do that. What it will do is deal specifically with this issue that has been so troublesome, and that is there will be a clear legislative grant to the IRS to deny tax exemptions to private schools that discriminate on the basis of race.

Certainly the Congress and the President agree, the administration agrees, that those schools should not have tax exemptions. In the minds of many and in the view of the Justice Department, there is more than just a question as to legislative authority; we don't believe that Congress at present has authorized this.

But we are not suggesting, just to restate what I began my answer with, that the proposed legislation is going to deal with all the questions. There are important constitutional questions involving religious freedom and other things. We don't think that they are present in any material degree in this bill. This bill will deal with one very specific problem that we all agree should be solved.

Secretary MCNAMAR. May I just elaborate on that a second, Mr. Chairman?

The CHAIRMAN. Yes.

Secretary MCNAMAR. I think the argument that you should just let this be decided by the Court is one that has to be explored fully.

When we looked at the case that was going up, it became clear to us that the most likely grounds on which the Supreme Court would reach a decision was not the question of first amendment religious freedom and the Government's tax exempt policy but rather did the IRS have authority to take the action that it took in the first place. And it was my personal view, which I still maintain, that absent this legislation the Court, following its normal practices of trying to decide on the grounds that do not require it to reach the ultimate constitutional question—in other words making sure that it is always seeking the cases that best frame the issue—would decide that the Service had no authority, would send it back, and we would simply be back in Congress in short order.

I think what is needed is a clear statutory mandate defining the Federal policy in this regard and then taking that case back to the Supreme Court for the ultimate resolution on the merits.

The CHAIRMAN. But I think some of us feel that if the Court would decide that then there would be some necessity for Congress

to move rather quickly. Now, quite honestly, the more you explore this issue the more difficult it becomes. I appreciate the White House sending it up here with their best wishes. [Laughter.]

But I am not certain—we may want to send it back. I know we can't suggest that the Court go ahead and make that decision, but hopefully they read the papers. And there is still that possibility, I understand. When will they make a decision? Is it February 22?

Secretary MCNAMAR. Yes, sir.

The CHAIRMAN. It is my understanding that in the House Ways and Means Committee there will be hearings on the fourth. They will have a panel of witnesses—I don't know how many panels of witnesses—and they will, in effect, decide that there is no need for legislation.

Now, certainly we want to cooperate with the administration. We are trying to find some way to do that so that it would be effective cooperation.

Someone has pointed out that the administration bill makes reference to religious beliefs requiring racial discrimination and that the bill could be read as denying an exemption to a church school that preaches racial discrimination but maintains a nondiscriminatory policy. Is that intentional? Can you preach racial discrimination and still have a nondiscriminatory policy?

Secretary MCNAMAR. The intent is to provide the absolute protection of the first amendment to religious beliefs. It is a question of whether you define preaching as being a part of belief. It is practices that the bill is aimed at, not beliefs. Beliefs are protected.

The CHAIRMAN. Well, I have some additional questions but, in following the early-bird rule, I think Senator Moynihan should proceed, or—maybe Senator Danforth should go first.

Senator DANFORTH. Thank you, Mr. Chairman.

Let me ask you, calling your attention to the bill, "The term 'racially discriminatory policy' does not include an admissions policy of a school or a program of religious training or worship of a school that is limited or grants preferences or priorities to members of a particular religious organization or belief." Is that a loophole?

Now, let me tell you why I asked that question. I am not talking about beliefs so much but the sociology of religion. Let's suppose in a hypothetical town there are two churches. One church is, say, the Southern Baptist Church and the other church is the A.M.E. Zion Church. And the Southern Baptist has within it all of the religious white people of the town. And the A.M.E. Zion Church has all of the religious black people of the town. And the Southern Baptist Church were to set up a school. All of the members of the church are white, not as a matter of doctrine but as a matter of sociology. Does this amount to a loophole?

Mr. WALLISON. Senator, I will try to respond to that. I think the purpose of this language was to make clear that if a church is running a school, sponsoring a school, the church has a right to limit the student body in the school to members of that church.

Senator DANFORTH. Of course. But why do we have to grant tax-exempt status for it?

Mr. WALLISON. The fact that a religious school is limited to members of that religion doesn't necessarily mean that the school is racially discriminating. For example, the classic case, is a yeshiva,

which is limited to people who believe in Judaism. The fact that there are no racial minorities in the school, would not be deemed to be a racial discrimination. Because we must give some latitude.

Senator DANFORTH. The yeshiva would be different, wouldn't it? Because there would be an exclusively religious curriculum.

Mr. WALLISON. No; a yeshiva could carry on both secular and religious activities. And there are many yeshivas that do engage in that kind of education.

What we are intending to cover here is a school which limits or grants preferences to people of that religion. And we did not want that to be taken as a token of discrimination. However, if it appears in the usual course of the review that there is deliberate discrimination going on, that the use of the religious cover is in effect an attempt to introduce racial discrimination—rather than merely to give some preference to members of the religion—then I think this legislation would permit——

Senator DANFORTH. Well, taking the hypothetical that I gave you, it would be true, wouldn't it, that all of the kids in the school would be white?

Mr. WALLISON. Yes, it would be true if the church was de facto made up only of white people.

Senator DANFORTH. That is the assumption.

Mr. WALLISON. But if a black person should attempt to enter the church and was admitted to the church and thus became eligible to go to the school, then there would be no evidence of discrimination. Or if a black person applied to the school and was admitted, again no evidence of discrimination.

Mr. REYNOLDS. Senator, could I add something to that which might help?

Senator DANFORTH. Yes.

Mr. REYNOLDS. The bill as proposed has in it an intent test, and it would be a necessary ingredient for purposes of the bill that the institution or school that you were talking about would be operating with the intent to discriminate on the ground of race. If, as I understand your hypothetical, the result of the religious doctrines and practices of the school happened to lead to a situation where you had an all-white student body or an all-black student body, that would not be a sufficient basis under the bill to deny exemption.

Senator DANFORTH. Yes. I would consider that to be a loophole, just at first blush.

Mr. REYNOLDS. Except I think the bill addresses that by having as an element of the legislation an intent test. You have to have an intent for purpose to discriminate on grounds of race.

Senator DANFORTH. We have a limit of time, and the yellow light is on. I just wanted to ask you one other question, a constitutional question.

I take it, that if the Congress in section 501(c)(3) were to limit tax-exempt status even for religions and even for religious schools to those which have an integrated student body, that would be perfectly within the right of Congress. There would be no constitutional infirmity for the same reason that there is no constitutional infirmity in 501(c)(3) in conditioning a tax-exempt status even for churches on their not engaging a principal part of their activity in

lobbying or in influencing legislation or in propaganda or in conducting political campaigns, and if Congress wanted to, constitutionally, it could say even for church schools, even for churches themselves, for that matter, that we condition tax-exempt status on the fact that the school is in fact an integrated school. Would you agree with that conclusion?

Mr. REYNOLDS. I think it raises some difficult issues. Generally speaking, I think that the first amendment question would focus on the practices themselves, and the Congress, as long as it was dealing in that area, could constitutionally operate.

Senator DANFORTH. I missed that answer.

Mr. REYNOLDS. I think, generally speaking, what you were saying would be correct, that you could constitutionally do that. Because I think, as I understood what you were saying, you were focusing on the practices and procedures of the institution, whether it is a religious organization or not, not legislating as to the beliefs.

Senator DANFORTH. No. All I am saying is this: If the Congress wanted in this bill to simply deny tax-exempt status to a school, even a church school that did not have de facto a certain percentage of blacks, if we want to have quotas in it—I don't think we do, but if we want it to have quotas—even for a church school that would not be constitutionally infirm.

Mr. REYNOLDS. Do you mean under the First Amendment or some other constitutional provision?

Senator DANFORTH. Any provision in the Constitution. That the denial of tax-exempt status does not raise a constitutional infirmity.

Mr. REYNOLDS. I guess that I would want to look at that. It depends, in defining it, whether you are treating some schools differently than other schools or some groups differently than other groups.

Senator DANFORTH. Any school. Just an across-the-board rule that no school gets tax-exempt status if it does not meet the requirements of the rule with respect to racial makeup.

Secretary MCNAMAR. If I may respond from the Treasury on that point (and Justice as usual will have a better considered legal opinion), my initial reaction is that would be constitutional as you have laid it out. It would clearly frame the issue for the Supreme Court as to whether those schools which did not meet that test as a matter of religious beliefs were protected by the First Amendment. And that would give us the ultimate Supreme Court decision that we need.

Senator DANFORTH. Mr. Chairman, if I could just in writing get a response from the administration on that question as we move forward with this bill, I would appreciate it. If you understand the question. Do you understand it?

Mr. REYNOLDS. Sure. We would be more than happy to respond to it in writing.

Senator DANFORTH. Yes, if you would just reflect on it. I think that that is correct; but if it is not, let me know.

Mr. REYNOLDS. It might be helpful if you could submit the question in writing so that we are exactly sure that we are talking about the right thing.

[Laughter.]

Senator DANFORTH. I will be glad to do it.

Mr. REYNOLDS. And then we will respond to it.

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. Mr. Chairman, this clearly is a matter on which persons of good will can have different views and give different weights to different considerations that are all, each in themselves, legitimate. I have expressed my personal regards to Mr. Schmults earlier, and I would like to say the same for Mr. McNamar. Their testimony was forthcoming and informative and important to us in seeing how you came to your judgment. But I do want to take issue with your argument in a spirit of trying to resolve this.

Just a moment ago Mr. Reynolds, in responding to Senator Danforth, made a slight slip of the kind we do. He asked of Senator Danforth: "Do you mean under the First Amendment or some other constitution?" That suggests to me just what constitution do you think we are working under here? And that is the point I would make about the 1970 decision.

Mr. Schmults, you said, "When confronted with the politically explosive issue in 1970, the Nixon Administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified."

And, Mr. McNamar, you said that the 1970 decision was not soundly based on statutory law.

I am here to report to the committee that the overwhelming basis for our judgment in 1970 was constitutional. We felt that in *Brown* v. *the Board of Education* the Supreme Court had declared segregated school facilities to be a violation of constitutional rights, and that violation had to be pursued and suppressed, or at least not encouraged, wherever it went.

Now, Mr. Randolph Thrower, Mr. Chairman, was then Commissioner of the IRS. He is a distinguished attorney practicing in Atlanta, as you know. He would like to appear when we have private witnesses to describe the thinking at that time, as would Eliot Richardson, who was Secretary of Health, Education and Welfare and was part of the group that reached this judgment not lightly but firmly, in our view.

This is not a marginal or exotic issue in American Government about which the IRS could make erratic judgment; this was then the central issue of public policy in our country, the overcoming of segregated institutions. And the U.S. Government was putting all its moral power behind the constitutional decision of the Court, and money, and resources of every kind available. And for the IRS not to see this as public policy would be to declare itself blind. It was carrying out a constitutional ruling as thought. And to argue the narrow legislative point seems to me to avoid the judgment that was in fact made in 1970 and which either will or will not be upheld by the Congress now.

We could take the view that you are right, there should be statutory provision; or we could take the view that the Constitution has been interpreted in such a way as to give the IRS no alternative.

You see that that is where the argument resides. Or would you respond? I am not trying to tell you what you think, Mr. McNamar.

Mr. MCNAMAR. I would like to respond, Senator, because I think we have laid out our concerns about the statutory basis. But I would like to take your point a half a step farther, if I may, and talk about the case involving *Green* v. *Connally*. I think the prevailing view and certainly the popular view in the press is that that case was a binding precedent on the Internal Revenue Service.

Senator MOYNIHAN. That case had not been decided. On July 10, 1970, Green was being litigated. It had not been decided.

Mr. MCNAMAR. That is correct.

Senator MOYNIHAN. We put out this ruling on the basis of what we judged to be the responsibility of the executive branch, having been directed by the Supreme Court to proceed with all deliberate speed to end segregation in education.

Mr. MCNAMAR. I understand that context, to be sure.

I think the point is a lot of people have felt that the *Green* v. *Connally* case confirmed in the Supreme Court the judgment of the then administration. And I would like to address that point for a moment because I think it would be helpful.

The three-judge Federal District Court in *Green* v. *Connally* added a new test, if you will, to the Internal Revenue Code, the charitable common-law test, which I think you are familiar with. But I would like to trace the history of that case just a little bit, if I may.

That case was summarily affirmed by the Supreme Court. As you know, summary affirmances traditionally have very little precedential value because there is no written opinion, no understanding of the rationale. But I think, more importantly in this case, it is worthwhile to draw the committee's attention to the fact that the Supreme Court specifically indicated that the summary affirmance was of no binding significance in this particular case.

If I may, for a second, the Court focused on the so-called special circumstances where the service did change its position pursuant to the White House instructions. What happened was that the Supreme Court later considered the *Green* v. *Connally* case, explicitly in the case of *Bob Jones* v. *Simon*, 416 U.S. 725. At page 740 the Court said two things, one in the text of the opinion and, second, in footnote 11, referring to the *Green* case. I would like to draw your attention to that because the Court said, quite pointedly, without indicating its views as to whether the Service's interpretation was correct or not, "As a defendant in *Green*, the Service initially took the position that segregated private schools were entitled to tax-exempt status under 501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus the Court," and it is referring to the Supreme Court, "affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy."

So the Court, I think, has dealt with the view as to whether the *Green* v. *Connally* case was in fact binding or not. And it seems fairly clear that the Court has said it is not.

Senator MOYNIHAN. Mr. Chairman, my time is up, and I thank Mr. McNamar for what is a very fair-minded statement of that fact. But the issue here is not whether *Green* is binding; the issue is whether *Brown* v. *Board of Education* is binding. And that was the basis of the judgment in 1970.

Mr. REYNOLDS. Mr. Chairman?

Senator MOYNIHAN. Yes, sir.

Mr. REYNOLDS. Could I respond to that just briefly? Would that be all right?

The CHAIRMAN. Yes.

Mr. REYNOLDS. First, Senator, I must have misspoken. I meant to say, instead of "First Amendment"——

Senator MOYNIHAN. It's the first time that has ever happened.

Mr. REYNOLDS. I meant to say "or some other constitutional provision," and I did not mean some other constitution.

Senator MOYNIHAN. Of course.

Mr. REYNOLDS. But I would like to respond to what you said, because *Brown* v. *Board of Education* spoke to racial discrimination in public schools. The issue we are talking about here is racial discrimination in private schools. Now, we don't condone that any more than racial discrimination in public education. But when you are saying that we are talking here about a constitutional issue rather than a statutory issue, I think that you are failing to recognize that there is a material difference between the situation that the Court addressed in *Brown* v. *Board of Education* and that the Court has wrestled with thereafter and the Congress has wrestled with thereafter in terms of how much public funding is being afforded to private institutions so as to make them sufficiently public to bring them within the constitutional protection as distinguished from the situation we have here of a private institution that does not have any public funding and is racially discriminating.

The question then is how do you reach that institution? And it is a serious question, and it is one that we have said and the administration has said, in terms of sending the legislation up here, that we think it would be appropriate for Congress to say that a sanction to impose against such an institution is to deny a tax exemption.

The Court said, in *Runyon* v. *McCrary* several terms ago, that 1981 allows private citizens to bring a private right of action against those institutions that are racially discriminating. But there again, the Government does not have an ability under 1981 to bring that action.

There is a fundamental difference between the issue that you were focusing on in *Brown* v. *Board of Education* and the issue that is involved here with regard to *Bob Jones* and *Goldsboro*. I think we have to be careful to keep those distinctions clear in mind, because it is not enough to say that *Brown* has settled this issue or that the constitutional imperative of the equal protection clause resolves this issue, and that therefore one should not be tolerant of any other argument or viewpoint on it. It is a very difficult question, and I am not suggesting in any way, shape or form that there is reason to tolerate racial discrimination in private institutions any more than in public institutions. But our constitution, as it has addressed that question, has addressed it in terms of the public education situation.

Senator MOYNIHAN. No, sir. Our Constitution says nothing about public or private education. It says nothing about education whatever. Our Court said in *Brown* v. *Board of Education* what you know it said. Obviously this is a matter which we can't resolve

today, Mr. Chairman, but I hope Mr. Thrower will have an opportunity to state his view.

I accept the fact that there are different views here. I see my distinguished friend and fellow New Yorker is present, and God help us all. [Laughter.]

Mr. Chairman, I have taken more than my share of the time.

The CHAIRMAN. Under the early-bird rule it is Senator Matsunaga, then Senator Grassley, and Senator Boren.

Senator MATSUNAGA. Thank you, Mr. Chairman.

I, too, wish to commend you gentlemen for having made a very able presentation, but I think you could have made as able a presentation on the other side if so directed.

What bothers me is that you base your case on the proposition that the IRS has no statutory basis for acting against private schools which segregate or which practice racial discrimination.

As I read the *Green* case, that provides for a legal basis for the IRS to deny tax-exempt status to racially discriminatory schools. Now, you seem to feel that the *Green* case does not provide any legal basis.

Somehow it bothers me that you seem to place so much emphasis on statutory basis as opposed to legal basis. You know as well as I do, having been in the legal profession I'm sure for years now, that there are rulings based on legal basis which need not be statutory, such as in the *Brown* v. *Board of Education.* And if you are seeking a legal basis, which you ought to be seeking, I would think that the *Green* case does provide sufficient legal basis on which the IRS could act.

What is your view on this?

Mr. REYNOLDS. Senator, I believe that the decision in *Green* rested very squarely on a statutory interpretation. We disagree with that statutory interpretation. We can't find any basis either in the language of the statute or in its legislative history to support the statutory interpretation that the *Green* decision has set forth. But I don't see that what we are dealing with in *Green* is any different kind of approach to the question than the one that we adopted. It is clearly a statutory interpretation analysis where the Court in *Green* came out with the conclusion that the concept of common law charity is included within the definition of education so as to require that all educational institutions also must be charitable. Judge Leventhal arrived at that decision on the basis of a statutory interpretation analysis that we just disagree with. I think that it is the same precise legal approach to the question that we have taken.

Mr. WALLISON. Senator, if I may also respond to that and add somewhat to the position of Mr. Reynolds. We felt in reviewing the theory of the *Green* case that it provided, as I think the testimony here outlines very well, the opportunity for mischief. It was not merely that the Court provided a rationale on the basis of their interpretation of statute, which I think is disputed quite well in the Justice Department memorandum, but it was also the fact that the theory provided an opportunity for the Internal Revenue Service to expand the notion of what is common law charitable activity which requires there to be imposed upon tax-exempt entities various elements of Federal public policy.

Now I don't think anyone here, as I think the testimony indicated, takes exception to the notion that racial discrimination is an element of Federal public policy. And had we been able to limit the theory of this brief as we approached the Supreme Court to the question of racial discrimination, then the brief would have been filed, and the United States would have been able to appear on the side of the Internal Revenue Service.

But, Senator, what happened was if you review the brief carefully, you review the theory carefully, you see that following out the theory would permit the Commissioner of Internal Revenue to decide whether, for example, sex discrimination is a matter of Federal public policy or sex nondiscrimination is a matter of Federal public policy, and thus revoke the tax exemption of, as Mr. McNamar suggested, Smith College.

We could also get into the very difficult question of abortion. What is Federal public policy on that question? You can read that one on both sides. These are not issues that ought to be determined, in our judgment, by the Commissioner of Internal Revenue or by any administrative agency.

Senator MATSUNAGA. Before you respond you might take into consideration the *Goldsboro* case also, instead of asking that it be declared moot. If you had supported the *Goldsboro* position, what then? Wouldn't you have had a legal basis for the IRS?

Secretary MCNAMAR. Could I go back to your earlier point? Because it deserves a careful answer, and I think that is why we are all so anxious to tell you everything that we can.

You said that we concluded that there was no basis in law. We really did not conclude that there was no basis whatsoever in law. That would be an incorrect statement of our position. There was clearly a colorable legal argument. The IRS has acted very, very responsibly during this period of time, and I think we should not in any way accept a characterization that you had some sort of a rogue organization here that was running amuck; because that is not true, and I don't think we should allow ourselves to fall into that trap.

The problem was that, if we adopted the rationale of the *Green* case, the common-law charitable trust rationale, there are no limits or guideposts or signposts whatsoever to limit the discretion of the IRS, despite the fact that we have had IRS Commissioners during this period of time who I think have acted responsibly. If I had to make the argument on the other side, I would have to argue that it would be within the authority of the Commissioner of the Internal Revenue Service to do as follows. For example, it is clearly national policy, I believe, to see the United States become self-sufficient in energy; it is clearly national policy to encourage domestic energy production. We can go through a variety of statutes and congressional actions that would support that contention. If it is true that is national policy would it not require the Internal Revenue Service Commissioner to revoke the tax exemption of an organization that did not support that national policy, specifically the Sierra Club?

Now, you can say that is a ludicrous example, but I submit that it is the legally and intellectually honest outcome of adopting the position that those who would support the *Green* case would have

us take, and we simply would not go that far because we would not support that conclusion. We think the Sierra Club is entitled to a tax exemption.

Senator MATSUNAGA. My time is up.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. I would like to ask the Justice Department whether the old distinction between adjudicated schools and reviewable schools is pertinent to the administration's proposed legislation.

Mr. REYNOLDS. I am not sure I fully understand your question.

Mr. SCHMULTS. Do you mean under the IRS regulations?

Senator GRASSLEY. Well, we have the legislation that is to solve the question of whether or not the IRS has the authority to deny tax-exempt status to certain schools that racially discriminate. Under a previously proposed policy of the IRS there was a division between those schools that were adjudicated or judged by the courts to be discriminatory, and those that were in a reviewable classification which referred to schools which were founded or expanded substantially during a period of desegregation. Would this distinction be pertinent to the administration's new proposal?

Secretary MCNAMAR. Senator, I'm afraid that we are all inadequately prepared to answer that question.

Senator GRASSLEY. OK.

Secretary MCNAMAR. If we might reserve it for an answer or to see if Commissioner Egger and the chief counsel of the Service could answer that, I think you would get the kind of information you are after. I apologize.

Senator GRASSLEY. OK. Then I want to go on to the procedure within the legislation. Under the administration's proposal is the IRS in every instance forced to seek a declaratory judgment to establish racial discrimination on the part of the school?

Mr. WALLISON. No, it is not, Senator.

Senator GRASSLEY. It is not in every instance?

Mr. WALLISON. No. In no instance is it required to seek a declaratory judgment. The legislation follows the current procedures that the IRS pursues, and that is that it investigates the information that is furnished by the applicant and determines ultimately, after the procedural review that occurs within the Service, whether or not the applicant is entitled to tax exemption. After that the matter can be reviewed. If it should be determined by the Service that tax exemption is not warranted, then the matter is taken by the applicant, in the normal case, to the tax court or the district court.

There is also available a declaratory judgment procedure for anyone who disputes the IRS's judgment, but that is not provided in the bill; it is already in the Internal Revenue Code.

Senator GRASSLEY. I would like to ask the Treasury Department: What about the back-tax liability for schools if this legislation passes?

Mr. WALLISON. If the legislation passes, since it is retroactive to July 10, 1970, there would be no refunds of taxes that are being sued for, nor would there be any responsibility on the part of the administration or the Internal Revenue Service to return any

moneys to schools whose tax exemptions have been revoked or denied.

Senator GRASSLEY. Well, did previous court decisions give all parties adequate notice that they might be facing a large back-tax liability if it was determined that they were engaged in racially discriminatory policies?

Mr. WALLISON. We certainly believe that, as a matter of notice, yes, there was sufficient notice.

Senator GRASSLEY. Mr. Chairman, that's all I have.

The CHAIRMAN. Senator Boren.

Senator BOREN. Mr. Chairman, first I want to say candidly that I have very great difficulty following the logic of some of the analogies that have been used, for example the Sierra Club analogy, in terms of public policy being to promote domestic energy production. Certainly the chairman and I agree there ought to be, and it's sound public policy, but it is not constitutionally mandated public policy. In other words, other things have been mentioned. Nowhere have we had a constitutional mandate from the courts that women would have to be ordained as priests, or other things that have been mentioned, or energy would have to be produced domestically. We have had a constitutional mandate from the courts for equal educational opportunity without regard to discrimination by race.

So I would just have to say that I hope the Treasury and the Justice Department will rethink the logic or lack of logic of the point of view that they have taken, because there is all the difference in the world between a Federal policy being required and a constitutional mandate being required. And I think that's what Senator Moynihan was saying earlier.

But I am more troubled by something else, and I guess that is by the spirit with which the administration has approached this decision. If we were to accept the idea that there needed to be statutory authorization for the IRS to act, if our true major goal was to prohibit discrimination in education on the base of race in this country, why was not a joint announcement made on January 8 that we have decided that there does not exist statutory authority and therefore we are going full out to recommend that Congress act immediately to establish such statutory authority? Why was the announcement of support for statutory change only made after there was an outburst of criticism of the decision to change the IRS approach?

Secretary MCNAMAR. Senator, let me answer both the points you raise, because we share your concern that you expressed about the *Green* case. The *Green* case did not bifurcate between constitutional and other rights whatsoever. It established a principle that was not imbedded in the Constitution, in the *Green* case.

Senator BOREN. But has the IRS been denying tax-exempt status to schools or to other institutions on any other basis other than racial discrimination that is rooted only in public policy?

Secretary MCNAMAR. Yes.

Senator BOREN. For example?

Secretary MCNAMAR. For example, they have denied a tax-exempt status for a periodical published by an organization that espouses a minority sexual position in the United States on the basis that it is not educational.

Senator BOREN. All right. Has the IRS withdrawn that regulation?

Secretary MCNAMAR. No.

Let me go to your point, if I may.

Senator BOREN. I am wondering why they haven't withdrawn that if they have withdrawn the one on racial discrimination on the basis that there is no statutory authority.

Secretary MCNAMAR. That one hasn't gotten to my desk yet. That is part of the answer on that.

Senator BOREN. All right.

I really wish you would go to the second question, which is of the greatest interest. We have limited time. If our number one goal is to prohibit racial discrimination rather than the goal of granting tax-exempt status to certain institutions that have not previously been granted it, it looks like we took care of that first and then as an afterthought at least in time, sequentially, we came in and supported statutory change. Now, why the time sequence? Why didn't we come with the statutory recommendation first and say, "Let's clear this up now. We've got some doubts. Let's nail this down in statute and then do the other."

Secretary MCNAMAR. Senator, you are absolutely right. Had we to do it over again, we would have made the joint announcement at the time. And I take full personal responsibility for that. And I think that ought to be noted. I had initially proposed that we consider legislation and announce it simultaneously. The legislation as we began to look at it—the first amendment question, the intent versus effects question, the civil rights statutes, and a variety of other things involved in the legislation—made it extremely complex to develop at the time. As I mentioned in my testimony, I was out of town at the time the decision was announced on the eighth. Had I been in town, I would have done the press background briefing, and I would have said in answer to the question of legislation that we had it under consideration.

Now let me be very candid in admitting that it was my mistake not to push hard enough, because I was working on Polish debts and some other things at the time. But you are quite right, and that's what we should have done.

Senator BOREN. Well, I certainly don't want to imply anything to the contrary, because I think you are an honest and honorable man, and I recognize you are not the ultimate policymaking authority, and I think you are conducting yourself very well today, but I am told by staff—we have been furnished with the record of internal memorandums on the subject, leading up to the decision, so we could have the chronology—I am told that there is not anything in that record that indicates exchange of memorandums back and forth or a request to the White House for support of statutory change prior to January 8. And that does trouble me.

Secretary MCNAMAR. I am not aware that anything was written down, because in our discussions we couldn't reach closure on some of the difficult issues.

Senator BOREN. Thank you.

The CHAIRMAN. Let me say for the record we are happy to have Congressman Rangel here. He is preparing a hearing on the fourth

at 10 a.m. If anybody would like to attend, tickets are available. [Laughter.]

Senator GRASSLEY. Mr. Chairman, I have one more question, when you are finished.

The CHAIRMAN. I have been asked to ask this question by Senator Durenberger, who is unable to be here this morning. I will ask that it be responded to by any member of the panel.

In your press release of January 8 you state the Service will restore the tax exemption of Bob Jones University and the Goldsboro Christian School. How do you justify this special treatment, then, in light of the clear statements in the Civil Rights Act and the *Green* case, the fact that in both instances the highest courts that had ruled did so against their tax-exempt status?

Secretary MCNAMAR. I think we have touched on two of the questions. The fact is, in our judgment at least, it was necessary to take that action in order to request the Supreme Court to moot the case so that we would not have to take a position in the Supreme Court that we did not believe was legally correct.

Again, as I said earlier, it was the classic example of a moral dilemma: You had a bad outcome from a decision that you made that you felt you had to make.

The CHAIRMAN. The administration's bill would deny tax exemption to schools that "refuse" to administer programs in a nondiscriminatory manner. Does this mean that a school must openly and avowedly discriminate to lose its exemption?

Secretary MCNAMAR. I think the answer is yes, if I understand the question.

Mr. SCHMULTS. Certainly the concept of refusal does not exclude the concept of establishing that a school has racially discriminatory policies by circumstantial evidence and a whole variety of ways. So the answer to the question as you asked it, I believe, would be no.

Mr. WALLISON. If I can elaborate slightly in addition to that.

The CHAIRMAN. We have a no and a yes. Is this going to break the tie? [Laughter.]

Mr. WALLISON. The use of the term "refuse" was intended to impose an intents or purposes test into the statute.

The CHAIRMAN. Right.

Senator DANFORTH. Will you repeat that? I just couldn't hear you.

Mr. WALLISON. The use of the term "refuse" was intended to impose an intents or purposes test to get away from a test based upon a count of the number of students of one race or another, but rather an effort to make sure that in order to be revoked there must be some demonstration that the school intended to discriminate.

Secretary MCNAMAR. I gave you the incorrect answer, because I missed on the words "open" and "avowedly."

The CHAIRMAN. Right.

Well, the Supreme Court has held that public policy should be considered in interpreting the tax laws, and the Court has accordingly disallowed a business deduction for fines and penalties even when the Tax Code did not expressly so provide. How is this principle different from disallowing a charitable contribution deduction

for gifts to schools that discriminate in violation of law or public policy?

Mr. REYNOLDS. Senator, that is the *Tank Truck* decision by the Supreme Court. It dealt with a much different provision of the code. It was section 162, and the issue there involved the interpretation of ordinary and necessary business expense. And the Court did hold there that in determining what was a necessary business expense for deduction purposes you could not include or write off State fines because of violations of the weight requirements that the State had. That case did not deal at all with the code provision that we are talking about here and, indeed, did not deal even with the question of charity or education or those issues.

Plus, I think it is important to note that subsequent to that decision both the Supreme Court and this Congress have narrowed considerably what that decision suggested in terms of the extent to which the IRS could read public policy considerations into a particular word in the Code and thereby define the nature of a deduction. So it seems to me that both in terms of the case itself, in this case, and in terms of subsequent action here in Congress and in the Supreme Court that it really does not suggest that the decision that we have reached here was an incorrect one.

The CHAIRMAN. Would the administration's bill affect affirmative action programs voluntarily adopted by private schools and universities?

Mr. REYNOLDS. I don't think it would affect them, if I understand the question. I don't think there would be any impact at all that the administration's bill would have on them.

The CHAIRMAN. There are voluntary affirmative action programs adopted by private schools and universities. I wouldn't think there would be any impact.

Mr. REYNOLDS. I don't see any.

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. Mr. Chairman, a number of the members of the committee have expressed their appreciation for the openness and the candor and the good spirit of our discussion this morning with Mr. Schmults and Mr. McNamar. And yet, responding further to the question that Senator Boren raised about how came it that the larger question of the need for statute followed the lesser question of the exempt status of these two schools by an interval during which a considerable number of persons such as I started screaming.

And, Mr. McNamar, it was very handsome of you to say, "It was my fault; I was out of town."

Secretary MCNAMAR. No. That wasn't the full answer, if I may. What I said was that it was a very complex question and that we were looking at it at the time. I think, quite candidly, what happened is that after I had made my initial decision that we could not continue to support the IRS we became consumed with the review process to make sure that that was the appropriate decision.

Senator MOYNIHAN. But sir, would you allow me to say this, with no vehemence but with much conviction? I have here your two-page statement of January 8, a two-page single-spaced subject on the issue of schools that segregate on the basis of race. And there is

not a word to suggest that the administration does not approve of segregation on the basis of race.

You are quoted, sir, as saying, "Whether or not the Treasury Department or this administration agrees with the position of the IRS in this particular case." Whether or not.

Then you talk about, "Thus, the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy." The constitutional right of equal protection in the laws is not a "notion" of public policy that comes in the springtime and goes out in the fall. This was something that was being slipped by us, and we all know it, and it didn't happen. And I think we don't have to dwell on that. But in the name of Heaven, go back to your Department and ask how we could get to the point where, 25 years after Brown, an administration could seriously say, "Whether or not we agree with racial equality is not the issue." Because you do agree. The President does. And what an enormous disservice is done him by this process, all to placate two Senators and one Congressman. My Lord. My Lord, the Presidency isn't worth it nor are your jobs. Now, you know, be yourselves down there, and things will go well.

Secretary MCNAMAR. That was not why it was done, Senator, I can assure you.

Senator MOYNIHAN. Well, I don't insist otherwise, and I certainly don't question your word. I certainly do not question your word. But this statement just abandons a quarter century of public effort.

Secretary MCNAMAR. No, sir. It was a commitment to enforce the laws of the United States as we saw them. And I very much feel like the little kid in the crowd who had to stand up and say, "The emperor has no clothes." I want to tell you I felt a grave responsibility in this matter.

Senator MOYNIHAN. But you could have said that this administration is against segregation in public schools or private schools or anywhere, and we are going to fight it no matter what we have to do; but we find that this procedure did not meet other requirements of law.

Secretary MCNAMAR. That is well taken.

Senator MOYNIHAN. I am sorry to have to say it, but the idea that this is a matter of "notions" of public policy—aargh! [Laughter.]

Mr. SCHMULTS. Senator Moynihan, I would like to state for the record, too, that the analysis and review we did of the legal authorities at the Department of Justice were not influenced by any communications the Department received from any Members of Congress or anybody else or the White House. That review was a strictly objective legal analysis of whether or not Congress had authorized the Internal Revenue Service to withhold tax exemptions.

Senator MOYNIHAN. If you say that, sir, then that is so. But you wouldn't say that is necessarily the case in the White House, would you?

Mr. SCHMULTS. What I have said is we received no directions from the White House with respect to this.

Senator MOYNIHAN. If you say it, it's true.

The CHAIRMAN. I think there is a letter dated December 16 or 15.

Senator MOYNIHAN. Yes.

Mr. SCHMULTS. I am not saying we didn't receive that, but we did not base our analysis on any of that information.

The CHAIRMAN. I understand that.

Senator Danforth.

Senator DANFORTH. Is S. 2024, which is the administration's bill, identical to what has been the practice of the IRS over the last decade?

Mr. WALLISON. I would say virtually identical, Senator.

Senator DANFORTH. How would it differ?

Mr. WALLISON. I think that that is a question that would be better addressed to the Commissioner and to his counsel when they appear next, but it was the intention to conform the two as closely as possible.

Senator DANFORTH. Is it your understanding that what you have called the "intent test" and the exception for schools with religious affiliations, that those provisions in the bill are the same as the practice of the IRS over the last decade?

Mr. WALLISON. I thought you were referring to the procedures when you asked whether the procedures are the same.

Senator DANFORTH. Is the substance of the bill the same as the substance of what the IRS has been enforcing over the last 10 years?

Mr. WALLISON. It is, with the exception of the fact that there is a reference to the religious organizations' position, which differs slightly from the position of the Service in its regulations.

Senator DANFORTH. Now, this is the last half of section (2)(i)?

Mr. WALLISON. Yes.

Senator DANFORTH. That, to me, is the most troublesome part of the bill. But is it your understanding that that does differ from IRS practice?

Mr. WALLISON. It differs in words. And I will leave it to the representatives of the Service to go into the actual nuances of difference. But the Service's position right now in its revenue procedures is that it is true; they take the position that you may limit your membership in a school to the members of a particular religion, but not if that religion itself discriminates on the basis of race.

Senator DANFORTH. That is their present position, and that is my understanding of the reading of this bill.

Mr. WALLISON. There are just some slight differences in language, and as a result I would not want to characterize the two as congruent. I believe they achieve the same thrust, but they are not necessarily identical.

Senator DANFORTH. And, therefore, if all members of a particular church in a community happened to be white, and if that church created a school and provided that all people who were enroiled in the school had to be members of the church, under IRS practice over the last decade that school would be entitled to tax-exempt status.

Mr. WALLISON. Unless it were clear, and again I want to caveat my reply by saying that you ought to confer on this matter also with the Commissioner and his counsel, but unless it were clear that the religious organization discriminated, itself, on the basis of race, that is the fact.

Senator DANFORTH. Discriminated as a matter of doctrine but not as a matter of de facto sociological——

Mr. WALLISON. I don't think doctrine is the question. It is part of the discrimination if the religious organization in fact discriminated, whether as a matter of doctrine or as a matter of fact, and that resulted in the inability of a person of another race to enter the school. Under prevailing Service procedures, then the school's tax exemption would be revoked.

Senator DANFORTH. Now, again, if we were to decide in legislating, for example the church affiliation provisions, that all the language in the last half of subsection (2)(i) were to be deleted, do you see any constitutional infirmity in doing that?

Mr. WALLISON. Are you addressing that question to me, Senator?

Senator DANFORTH. To anybody who wants to answer.

Secretary MCNAMAR. I'm sorry, we are unclear to what is being deleted, Senator.

Senator DANFORTH. Just hypothetically, let's suppose that there was an amendment to this bill to strike all of section (2)(i) beginning with the term "Racially discriminatory policy does not include," and so on. Would the bill as passed be constitutionally infirm?

Mr. REYNOLDS. I do not think it would be constitutionally infirm on its face, but it may well be unconstitutional as applied. And that would depend, again, on how an organization that was supposed to have a racially discriminatory policy, how that was resolved in the courts depending on the particular practices of the organization. If you did that I don't think that you would render the statute unconstitutional, but I think that you would raise a host of problems that the Court would have to resolve in terms of application of that statute.

Senator DANFORTH. Well, let me say this. We could provide, constitutionally, could we not, in a statute, that if a school were to get tax-exempt status it would have to in fact open its doors to all kids regardless of race. We could provide that, couldn't we? And that the fact that there are no kids of that race who belong to the church in question would be no excuse. We could make that provision, couldn't we?

Secretary MCNAMAR. I think so.

Senator DANFORTH. Do you agree with that, Mr. Schmults?

Mr. SCHMULTS. I believe so, yes. I think those questions are ones we would certainly want to study, and we would be happy to provide an answer in writing, Senator.

Senator DANFORTH. OK.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Since we are getting at racial discrimination in private schools, how come in the drafting of this language—and I am looking at the administration's bill—we refer to an organization? Why can't we just simply say that any school, instead of referring to an organization that maintains a school, so that there is no question that we are going beyond just the school? In other words, that we won't be giving the IRS any additional authority to examine any other type of organization? Isn't the purpose of the legislation to stop racial discrimination in schools?

Mr. WALLISON. Yes, sir.

Senator GRASSLEY. Then why all the language about an organization maintaining a school that would maybe lead legislators to think that the IRS is looking for some excuse to get into some other organization?

Mr. WALLISON. This is the Internal Revenue Service's regulations essentially codified. This is the definition of "school," as I understand it, that they use in their regulations.

Senator GRASSLEY. So the answer to the question is, "That's the way it has been for the last 10 years."

Mr. WALLISON. That is the way it has been, and it has avoided ambiguities in the use of the term "school" which might apply to correspondence schools and things of that kind which are not adequately defined by the use of the simple word "school."

Senator GRASSLEY. The existing legislation gives people some cause for concern about the IRS digging into religious beliefs and tenets when examining an organization. If the IRS is examining religious organizations in addition to religious schools now, wouldn't this be the opportune time to narrow that practice?

Mr. WALLISON. Well, I would say simply that the definition of "school" that is used in this statutory provision should not expand unduly the authority of the Internal Revenue Service.

Senator GRASSLEY. Well, what about the possibility that that language already expands it beyond schools presently? Or maybe in practice it hasn't.

Mr. WALLISON. I don't believe it does, and I don't see anything in it which, under a normal reading, would suggest expansion beyond schools. I think it tends to narrow the term "school."

Senator GRASSLEY. In your judgment it is limiting instead of expansive?

Mr. WALLISON. It does to me; yes, sir.

Senator GRASSLEY. OK.

Then my second question deals with the subject of the burden of proof. Assuming that the language that has been proposed in the administration's bill becomes law, the burden of proof since the 1978 revenue procedure would remain the same, which generally means that the school must give clear and convincing evidence that it is not discriminatory?

Mr. WALLISON. No, sir. The present burden of proof is, under the tax laws, on the taxpayer. But that does not require the taxpayer to give clear and convincing evidence of his position which would justify an exemption. You are referring, I think, Senator, to the Rev Procs that were announced in August of 1978. You are also referring perhaps to the judgment of Judge Hart in the second *Green* case, the injunction which resulted in the revocation of certain tax exemptions. That did create an affirmative action standard. Now the former, that is, the August 22, 1978, regulations, are now fairly well bottled up by the so-called Ashbrook-Dornan amendments. They are not being enforced at all. And as for the Court's order in the second *Green* case, the result of complying with that order is now a case before the Tax Court, in which 5 schools whose tax exemptions have been revoked are presently involved. But that standard of clear and convincing evidence no longer applies and would not be applied if this statute were enacted, sir.

Senator GRASSLEY. OK. Because of the Ashbrook amendment.

Mr. WALLISON. Let me put it this way. The Ashbrook amendment is prohibiting the Service from applying that standard. It is the policy of the Service now, at the present time, and you may explore this with the Commissioner when he appears, not to invoke that standard. But I would expect that you would ask him that question.

Senator GRASSLEY. Is it only because of the silence of the proposed legislation plus the fact that this administration is not enforcing the 1978 regs, that keeps this standard from being invoked?

Mr. WALLISON. Yes. There is nothing in this legislation which would give the Commissioner the authority to impose a clear and convincing standard.

Senator GRASSLEY. If this legislation passes could some subsequent administration go to the standards set in the 1978 regs?

Mr. WALLISON. Well, I would think not; although it is always difficult to deal with theories that might be developed in the future. But the purpose of using the language that is used here, "refuses to admit students of all races," was to bring in an intent standard. And inasmuch as the Tax Code already puts a burden of proof on the taxpayer, those two in combination should make it extremely difficult, I would think, for a Commissioner at some time in the future to require an affirmative action standard of the kind that is embodied in the words "clear and convincing evidence" from any school.

Senator GRASSLEY. If we wanted to make it crystal clear, though, the administration's legislation would have to be amended.

Mr. WALLISON. If you wanted to make it even clearer, I would think so. Yes, sir.

Senator GRASSLEY. Thank you, Mr. Chairman. I am done.

The CHAIRMAN. Was there a joint effort in drafting the legislation, with Justice and Treasury and White House involvement?

Mr. SCHMULTS. Yes, both Departments and the White House participated in the drafting of the legislation.

The CHAIRMAN. Have there been any second thoughts about the legislation? Is there anything that should be added or changed? Will you be suggesting any revisions of the draft that has been introduced?

Mr. SCHMULTS. No.

The CHAIRMAN. In your view does the first amendment require that religious organizations be exempt from income and employment taxes?

Mr. REYNOLDS. Generally, there are a lot of difficult questions in the first amendment area, but I don't believe that the first amendment requires exemption of employment or income taxes for religious organizations. I think that, again, it turns on the point that the legislation focuses on, and that is whether religious organizations' practices are—whether you are aiming at practices or beliefs. And I think that exemptions that are denied or granted in that context, what the courts have generally held is that you can hold the beliefs that you want to hold but you are not going to be immune from taxation as a result of those beliefs, any more than, for example, in the situation of polygamy, one's religion does not allow the practice of polygamy, although certainly one can continue to believe in polygamy. And I think it is the same philosophy.

So I don't think religious organizations would be exempt from taxation under the first amendment.

The CHAIRMAN. As I understand, the legislation is more or less a codification of what the IRS regs are now. We will discuss those with Mr. Egger. But is that correct, or are there some minor changes?

Mr. WALLISON. Yes. That is the correct characterization, I believe, Senator.

The CHAIRMAN. So it is an affirmation, supporting the policy of the IRS?

Mr. WALLISON. It is to put into place the statutory authority which we did not believe was in place for what the Service was doing. It is totally consistent with the position that we had initially taken, which is that there was no statutory authority here.

The CHAIRMAN. I am still not certain, and maybe I don't understand, what we would have lost had the Supreme Court made a decision in these two cases.

Mr. WALLISON. I would like to respond to that, because you raised that question earlier.

The CHAIRMAN. Well, I raised it because we are faced with a problem here. I don't know if there is any conversation now between the Justice Department and the Court, or whether that is even appropriate. But I don't know whether we will pass any legislation or not. There are all kinds of resolutions saying don't do anything, or do something. We, of course, can't require that the Court go ahead and decide the case. I think the NAACP has made some suggestions. I guess Bob Jones indicated initially that they wanted the Court to decide the case, and then withdrew their request. We are working on a resolution that might have the approval of the majority of the Senate—I can't speak for the House—but we are not certain we can accomplish anything with that resolution.

In other words, I am not certain I can tell you what the fate of this legislation might be. We would certainly have additional hearings if we intend to proceed with the legislation, because we have people with different views. Senator Helms, of course, has one view; Senator Hart has one view. They would both have liked to be here today, but we decided that maybe we wouldn't hear from them on Monday, maybe some other day.

But this all gets back to the question of why shouldn't the Court go ahead and give us some guidance?

Mr. WALLISON. Senator, I would just like to make sure that the way the decision was reached is correctly characterized before the committee. Our problem, the stumbling block we encountered, was the legal theory which the Internal Revenue Service was pursuing. As soon as it became clear that the administration could not endorse that legal theory, then there was no one appearing on the other side in the case before the Supreme Court. And, as a result, it became clear the case was in fact moot. When both sides are appearing in support of the same proposition, there isn't a case for the Supreme Court to consider. That is why it was not possible for us to cause a Supreme Court ruling on this question. It may still not be possible to cause such a ruling, because if the administration appears on the same side of the case, arguing in effect that the

Service does not have the authority to revoke tax exemptions as it did in this case, the Supreme Court may well decide that it does not have a case or controversy before it and in that sense determine that it will not hear the case.

That is how this developed. That is why we were compelled in effect to moot the case and to grant the tax exemptions. Because once you take the position that the Service's actions were not authorized, then in order to comply with the law you must go ahead and grant the tax exemptions. And that is the position we are in at the present time.

The CHAIRMAN. Are there other questions? Senator Danforth?

Senator DANFORTH. No.

The CHAIRMAN. Senator Grassley?

Senator GRASSLEY. No.

The CHAIRMAN. Well, if we do enact the legislation retroactively, then you have the Bob Jones issue again. Is that correct?

Mr. WALLISON. Yes. I think, Senator, if the legislation is enacted, and we strongly recommend that the Congress go ahead and enact the legislation, then the issue does arise again in the context, I believe, of the religious schools question. The major issue to be resolved, it seems to me, by the Supreme Court, is how far you may go in imposing a policy against racial discrimination when there is a religious conviction held in good faith, which warrants or mandates or justifies, in the eyes of those who hold it racial discrimination. That is a question for the Supreme Court legitimately to decide. That is not the issue that stopped us in this case. We did not reach that issue, because we reached, as Deputy Secretary McNamar indicated in his testimony, first the question of whether the Internal Revenue Service in fact had the statutory authority to do what it was doing. And for the reasons outlined by the Justice Department and the Deputy Secretary we felt that it did not have that authority.

Now, if it is given the authority by legislation, then the case comes up to the Supreme Court in the posture in which it should have been considered, and that is on this major issue of constitutional law as to the clash, if you will, between the obvious public policy goal against racial discrimination and the equally obvious desire, invited to some extent in the Constitution, to accord all latitude to religious belief.

The CHAIRMAN. Are there any other statements? There will probably be additional questions. Some members are not able to be here today because of snowstorms, and other commitments. We will be asking both Justice and Treasury for assistance as we proceed.

It just seems to me that everything you say may be absolutely correct, but there has been such an avalanche of feeling about racial discrimination. You are not going to get any votes in this committee for racial discrimination. But I think, legislation is going to be very difficult until there is a full understanding. I don't know if what you said has reached the public yet, and it may never reach the public. I think the attitudes are fairly well fixed, having just returned from my State. So we may be considering this at the time we are working with it. There is no doubt about it, as Senator Boren and Senator Moynihan indicated, hindsight is perfect. Had there been a joint announcement, A and B, but there wasn't. So

there will always be a question in the minds of some: Did the administration intend to do anything? That did hurt the President's credibility. I think, as some have said with some justification, it is not what he intends but it is what the effects may be. If you look around, I can understand why both sides are unhappy. That takes a little doing. [Laughter.]

At least that is a milestone, or a millstone, depending on your point of view.

Are there other questions? Does anyone want to add anything? I don't want to shut anyone off.

[No response.]

The CHAIRMAN. Unless there is some suggestion, I think we will go ahead, then, and hear Mr. Egger before lunch.

Mr. Egger, you may proceed any way you wish. I know you have a written statement, and however you want to proceed would be fine.

Commissioner EGGER. Mr. Chairman, I have a somewhat more complete written statement, and I would like to submit that for the record.

The CHAIRMAN. Without objection.

[The prepared statement follows:]

STATEMENT OF
ROSCOE L. EGGER, JR.
COMMISSIONER
OF INTERNAL REVENUE
BEFORE THE
SENATE COMMITTEE ON FINANCE
FEBRUARY 1, 1982

I APPRECIATE THE OPPORTUNITY TO APPEAR TODAY TO DISCUSS THE SERVICE'S ADMINISTRATION OF THE LAW WITH RESPECT TO TAX EXEMPTION FOR RACIALLY DISCRIMINATORY PRIVATE SCHOOLS AND DEDUCTIBILITY OF CHARITABLE CONTRIBUTIONS TO THEM. ACCOMPANYING ME IS MR. KENNETH W. GIDEON, IRS CHIEF COUNSEL.

SERVICE INVOLVEMENT IN THIS AREA BEGAN AFTER THE SUPREME COURT DECISIONS IN BROWN V. BOARD OF EDUCATION AND BOLLING V. SHARPE[1] HOLDING RACIAL DISCRIMINATION IN PUBLIC EDUCATION TO BE UNCONSTITUTIONAL. AFTER THESE DECISIONS, A NUMBER OF SEGREGATED PRIVATE SCHOOLS WERE ESTABLISHED WITH TUITION AND TEXTBOOK ASSISTANCE FROM STATE AND LOCAL GOVERNMENTS. FEDERAL COURTS IN THE 1960S RULED THAT GOVERNMENT AID TO THESE RACIALLY DISCRIMINATORY PRIVATE SCHOOLS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.[2]

1 BROWN V. BOARD OF EDUCATION, 347 U.S. 483 (1954); BOLLING V. SHARPE, 347 U.S. 497 (1954)

2 GRIFFIN V. BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, 379 F. 2ND 48 (4TH CIR. 1964); POINTDEXTER V. LOUISIANA FINANCE ASSISTANT COMMISSION, 273 F. SUPP. 833 (ED LA 1967), AFFD. PER CURIAM, 389 U.S. 571 (1968); COFFEY AND UNITED STATES V. STATE EDUCATION FINANCE ASSISTANCE COMMISSION, 296 F. SUPP. 1389 (SD MISS 1969)

THESE COURT RULINGS LED TO DELIBERATIONS BY THE SERVICE, THE TREASURY DEPARTMENT, AND THE DEPARTMENT OF JUSTICE AS TO WHETHER PRIVATE SEGREGATED SCHOOLS WOULD BE ENTITLED TO TAX EXEMPTION AND WHETHER CONTRIBUTIONS TO THESE SCHOOLS WOULD BE DEDUCTIBLE. AS AN INTERIM MEASURE WHILE ASSESSING THE EFFECT OF COURT DECISIONS, THE SERVICE IN 1965 SUSPENDED ISSUING RULINGS TO THE INCREASING NUMBER OF PRIVATE SCHOOLS SEEKING EXEMPTION FROM FEDERAL INCOME TAX. AFTER CONSIDERABLE REVIEW, THE SERVICE ANNOUNCED IN 1967 THAT TAX EXEMPTION WOULD BE DENIED AND CONTRIBUTIONS WOULD NOT BE DEDUCTIBLE TO RACIALLY SEGREGATED PRIVATE SCHOOLS WHOSE OPERATION WITH STATE AND LOCAL GOVERNMENT AID WAS UNCONSTITUTIONAL OR IN VIOLATION OF THE LAWS OF THE UNITED STATES.[3] HOWEVER, RACIALLY DISCRIMINATORY SCHOOLS THAT OPERATED WITHOUT STATE SUPPORT OR AID WOULD CONTINUE TO BE EXEMPT FROM FEDERAL INCOME TAX.

IN 1969, THE SERVICE WAS SUED BY THE PARENTS OF BLACK CHILDREN IN THE STATE OF MISSISSIPPI. THEIR ARGUMENT WAS THAT THE AVAILABILITY OF TAX EXEMPTION AND DEDUCTIBLE CONTRIBUTIONS TO A PRIVATE RACIALLY DISCRIMINATORY SCHOOL AMOUNTED TO UNCONSTITUTIONAL GOVERNMENT ACTION. THEY ASSERTED THAT THESE SCHOOLS FAILED TO QUALIFY FOR EXEMPTION BECAUSE THEIR PRACTICES VIOLATED CLEAR FEDERAL PUBLIC

[3] IRS NEWS RELEASE DATED AUGUST 2, 1967

POLICY AGAINST RACIAL DISCRIMINATION. A THREE-JUDGE FEDERAL COURT IN THE DISTRICT OF COLUMBIA ON JANUARY 12, 1970, ORDERED THE SERVICE IN A PRELIMINARY INJUNCTION NOT TO RECOGNIZE TAX EXEMPT STATUS OR ALLOW CHARITABLE CONTRIBUTIONS TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS IN MISSISSIPPI.[4] ON JUNE 26, 1970, THE COURT ENTERED A SUPPLEMENTAL ORDER REQUIRING THE SERVICE TO SUSPEND ADVANCE ASSURANCE OF DEDUCTIBILITY OF CONTRIBUTIONS TO SEGREGATED SCHOOLS IN MISSISSIPPI.[5]

IN JULY 1970, THE SERVICE ANNOUNCED THAT IT COULD NO LONGER LEGALLY JUSTIFY ALLOWING TAX EXEMPTIONS TO PRIVATE SCHOOLS THAT RACIALLY DISCRIMINATE NOR TREAT CONTRIBUTIONS TO SUCH SCHOOLS AS TAX DEDUCTIBLE.[6] TO QUALIFY FOR SUCH BENEFITS, ALL PRIVATE SCHOOLS WERE REQUIRED TO ADOPT AND PUBLICLY ANNOUNCE A POLICY OF RACIAL NON-DISCRIMINATION. THE THEN COMMISSIONER OF THE INTERNAL REVENUE SERVICE INDICATED THAT THE LEGAL ASPECTS OF THIS ISSUE HAD BEEN DISCUSSED AND STUDIED IN GREAT DEPTH WITHIN BOTH THE TREASURY DEPARTMENT AND THE DEPARTMENT OF JUSTICE AND THAT BOTH DEPARTMENTS WERE IN ACCORD WITH THE POSITION.[7] THE WHITE HOUSE ALSO ISSUED A PRESS RELEASE ENDORSING THIS POSITION.

4 GREEN V. KENNEDY, 309 F. SUPP. 1127 (D.D.C. 1970) [PRELIMINARY INJUNCTION], APPEAL DISMISSED SUB NOM. CANNON V. GREEN, 398 U.S. 956 (1970), APPEAL FROM SUBSEQUENT ORDERS DISMISSED SUB NOM. COIT V. GREEN, 400 U.S. 986 (1971).

5 GREEN V. KENNEDY, 26 AFTR 2D 70-5416 (D.D.C.) [REVISED PRELIMINARY INJUNCTION]; GREEN V. CONNALLY, 330 F. SUPP. 1150 (D.D.C.) [PERMANENT INJUNCTION], AFF'D SUB NOM. COIT V. GREEN, 404 U.S. 997 (1971).

6 IRS NEWS RELEASES JULY 10 AND 19, 1970

7 TESTIMONY BEFORE THE SELECT COMMITTEE FOR EQUAL EDUCATIONAL OPPORTUNITY ON AUGUST 12, 1970

CONCLUDING THAT RACIALLY DISCRIMINATORY PRIVATE SCHOOLS WERE NOT ELIGIBLE FOR TAX BENEFITS AVAILABLE TO CHARITIES, THE THREE-JUDGE COURT IN GREEN ENTERED THE PERMANENT INJUNCTION IN JUNE OF 1971. A CHALLENGE ON THE MERITS OF THE ORDER WAS MADE BY PARENTS SUPPORTING SCHOOLS WITH EXCLUSIVELY WHITE ENROLLMENTS. ON AN APPEAL BY THE WHITE PARENTS, THE UNITED STATES SUPREME COURT AFFIRMED PER CURIAM THE LOWER COURT.[8]

IN 1970, THE SERVICE EXAMINED PRIVATE SCHOOLS IN MISSISSIPPI AND, APPLYING SIMILAR PROCEDURES SURVEYED 15,000 SCHOOLS NATIONWIDE. THESE ACTIONS RESULTED IN REVOCATION OF THE TAX EXEMPT STATUS OF OVER 100 SCHOOLS THAT WOULD NOT ADOPT AND PUBLICIZE A RACIALLY NONDISCRIMINATORY ADMISSIONS POLICY. INCLUDED AMONG THE SCHOOLS THAT REFUSED TO ADOPT SUCH A POLICY WAS ROB JONES UNIVERSITY. IT SHOULD BE NOTED THAT THE SERVICE GAVE EVERY PRIVATE SCHOOL WITH A RACIALLY DISCRIMINATORY POLICY AN OPPORTUNITY TO CHANGE THAT POLICY BEFORE IT TOOK ACTION.

SINCE 1970, THE SERVICE HAS TAKEN A NUMBER OF ADDITIONAL STEPS TO IMPLEMENT THE RACIAL NONDISCRIMINATION REQUIREMENT. IN 1971, IRS PUBLISHED A RULING EXPLAINING THE NONDISCRIMINATORY REQUIREMENT,[9] AND, IN 1972, THE SERVICE PUBLISHED A PROCEDURE THAT ESTABLISHED GUIDELINES FOR PUBLICIZING A SCHOOL'S RACIALLY NON-DISCRIMINATORY POLICY.[10]

8 COIT V. GREEN, 404 U.S. 997 (1971). THE SUPREME COURT IN ROB JONES UNIVERSITY V. SIMON, 416 U.S. 725, 740, FN. 11, STATED THAT THE GREEN AFFIRMANCE "LACKS THE PRECEDENTIAL WEIGHT OF A CASE INVOLVING A TRULY ADVERSARY CONTROVERSY."

9 REV. RUL. 71-447, 1971-2 C.B. 230

10 REV. PROC. 72-54, 1972-C.B. 834

Following its initial nationwide survey of tax exempt schools, the Service during 1973 through 1975 had an examination coverage which ranged from 2% to 4%. During this period, an examination of Goldsboro Christian Schools was conducted because of its claim for refund of certain employment taxes. This examination resulted in the litigation which became the companion case to Bob Jones.

Experience with these examinations indicated to the Service that specific guidelines were needed to ensure uniform enforcement nationwide and the Service proceeded to develop these. The United States Commission on Civil Rights, the Civil Rights Division of the Justice Department, and several members of Congress also expressed the need for specific examination guidelines.

In December 1975, Revenue Procedure 75-50 was published[11] clarifying IRS guidelines for tax exempt schools and establishing recordkeeping requirements. Recognizing the sensitivity associated with this particular issue, the Service took the unusual step of publishing the procedure in proposed form to afford the public, educational institutions, and other interested parties the opportunity to comment. The final version of the procedure required all tax exempt private schools to adopt formally a racially nondiscriminatory policy, to refer to the policy in all brochures and catalogues, and generally to publish notice of this policy annually in a newspaper or by use of the broadcast media. Detailed

[11] Rev. Proc. 75-50, 1975-2 C.B. 587

EXAMINATION GUIDELINES WERE ALSO ISSUED DURING THIS PERIOD.

ALSO IN 1975, THE SERVICE PUBLISHED A REVENUE RULING CLARIFYING AND EXPLAINING ITS POSITION THAT ORGANIZATIONS, INCLUDING CHURCHES, WHICH ESTABLISH PRIVATE SCHOOLS WITH A POLICY OF REFUSING TO ACCEPT CERTAIN RACIAL AND ETHNIC GROUPS WILL NOT BE RECOGNIZED AS TAX-EXEMPT CHARITIES UNDER SECTION 501(c)(3) OF THE CODE.[12] REVENUE PROCEDURE 75-50, HOWEVER, MADE IT CLEAR THAT A SCHOOL WHICH ENROLLS STUDENTS BASED ON RELIGIOUS AFFILIATION WILL NOT BE DEEMED TO HAVE A DISCRIMINATORY POLICY IF THE RELIGION IS OPEN TO ALL ON A RACIALLY NONDISCRIMINATORY BASIS.

IN 1976, THE PLAINTIFFS IN THE GREEN CASE REOPENED THAT SUIT, ASSERTING THAT THE SERVICE WAS NOT COMPLYING WITH THE COURT'S CONTINUING INJUNCTION THAT RACIALLY DISCRIMINATORY MISSISIPPI PRIVATE SCHOOLS BE DENIED TAX EXEMPTION AND REQUESTING FURTHER INJUNCTIVE RELIEF.[13] IN ADDITION, A COMPANION SUIT WAS FILE NOW ENTITLED WRIGHT V. REGAN, ASSERTING THAT THE SERVICE'S ENFORCEMENT OF THE NONDISCRIMINATION REQUIREMENT ON A NATIONWIDE BASIS WAS INEFFECTIVE.[14]

12 REV. RUL. 75-231, 1975-1 C.B. 158. SEE ALSO TIR 1379 (5/27/75) STATING THAT THE DE MINIMIS RULE WILL BE FOLLOWED IN ADMINISTERING REV. RUL. 75-231.

13 GREEN V. SIMON, CIV. NO. 1355-69(D.D.C)

14 WRIGHT V. SIMON, CIV. NO. 76-1426 (D.D.C.). IN WRIGHT V. BLUMENTHAL, 480 F. SUPP. 790 (D.D.C. 1979), THE COURT DISMISSED PLAINTIFFS' COMPLAINT PRIMARILY FOR LACK OF STANDING. THE DECISION WAS REVERSED IN WRIGHT V. REGAN, 81-2 U.S.T.C. ¶9504 (D.C. CIR. 1980). THE SOLICITOR GENERAL HAS FILED A PETITION FOR CERTIORARI WITH THE SUPREME COURT TO REVIEW THIS DECISION.

ALSO IN 1976 THE SERVICE UNDERTOOK TO EXAMINE 10% OF ALL SCHOOLS HAVING INDIVIDUAL EXEMPTION LETTERS UNDER SECTION 501(c)(3). THIS COVERAGE CONTINUED UNTIL JULY 7, 1978, WHEN ELEMENTARY AND SECONDARY SCHOOL EXAMINATIONS WERE SUSPENDED BECAUSE OF THE REEXAMINATION OF FACTORS TO BE USED IN DETERMINING WHETHER A SCHOOL HAS A RACIALLY NONDISCRIMINATORY ADMISSIONS POLICY.

AS THE INTERNAL REVENUE SERVICE THROUGH THE THEN COMMISSIONER TESTIFIED BEFORE CONGRESSIONAL COMMITTEES IN 1979, THE REOPENING OF GREEN AND THE FILING OF WRIGHT HAD CAUSED THE SERVICE TO EXAMINE THE EFFECTIVENESS OF ITS EFFORTS TO ENSURE THAT ONLY RACIALLY NONDISCRIMINATORY SCHOOLS SHOULD BE RECOGNIZED AS TAX EXEMPT.[15] OF SPECIAL CONCERN TO THE SERVICE AT THAT TIME WAS THE FACT THAT SOME SCHOOLS THAT HAD BEEN ADJUDGED DISCRIMINATORY BY THE COURTS CONTINUED TO BE TAX EXEMPT.[16] ACCORDINGLY, ON AUGUST 22, 1978, THE SERVICE, AS IT HAD IN 1975, PUBLISHED FOR PUBLIC COMMENT A PROPOSED REVENUE PROCEDURE[17]. IT WAS INTENDED TO SERVE AS A GUIDE FOR IRS PERSONNEL AND THE PUBLIC FOR USE IN DETERMINING WHETHER A PRIVATE SCHOOL ACTUALLY OPERATED ON A RACIALLY NON-DISCRIMINATORY BASIS.

15 PROPOSED IRS REVENUE PROCEDURE AFFECTING TAX EXEMPTION OF PRIVATE SCHOOLS: HEARINGS BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF THE HOUSE COMMITTEE ON WAYS AND MEANS, 96TH CONG. 1ST SESS. 479 (1979).

16 NORWOOD V. HARRISON 382 F. SUPP. 921, 929 (N.D. MISS. 1974), ON REMAND FROM SUPREME COURT, 413 U.S. 455 (1973); BRUMFIELD V. DODD, 425 F. SUPP. 528 (E.D. LA. 1976)

17 PROPOSED REVENUE PROCEDURE 73 FED. REG. 37, 296 (1978)

The proposed revenue procedure would have required a private school that had been adjudged discriminatory or one founded or expanded at the time of public school desegregation to make a strong showing of nondiscrimination. The proposed procedure was the subject of over 150,000 letters from the public, and in December 1978, four days of public hearings were held. In February 1979, a revised proposed procedure[18] was published for public comment. It provided greater flexibility for a school to show it is operating on a racially nondiscriminating basis.

As a result of the strong public reaction to the publication of the proposed procedures, hearings were held on April 17, 1979, before the Senate Subcommittee on Taxation and Debt Management of the Finance Committee, and on July 26, 1979, before the Full Senate Finance Committee. The Service also testified before the Subcommittee on Oversight of the Committee on Ways and Means on February 20 and March 23, 1979.

[18] Announcement 79-38, 1979-11 IRM 33

On September 29, 1979, amendments to the Treasury Appropriations Bills, by Representatives Dornan and Ashbrook precluded the Service from adopting the proposed revenue procedures and from formulating guidelines, regulations, standards or measures which would cause the loss of tax exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Code unless in effect prior to August 22, 1978. These restrictions have been carried over to subsequent appropriations bills. The 1982 continuing resolutions adopted these restrictions and further restricted the Service from implementing court orders.

On May 1, 1980, a limited nationwide examination program was instituted. In general, examinations were to be conducted only in instances where there was an indication of racial discrimination or where complaints of racial discrimination were made. This examination program continues at this time.

In May and June of 1980, the District Court in Green entered revised injunctive orders against the Service and Treasury.[19] These orders required the Service to review the tax exempt status of Mississippi private schools under standards similar to those proposed by the Service in 1979. For example, a private school founded at the time of public school desegregation was required as a condition for continued exemption to show that it had engaged in objective acts, such as minority recruitment, to overcome an inference that it discriminated, notwithstanding a published policy of nondiscrimination. On July 7, 1980, the government announced that

[19] Green v. Miller, 45 AFTR 2d 80-1566 (D.D.C. 1980)

IT WOULD NOT APPEAL THE DECISION.

AS A RESULT OF COMPLYING WITH THE REVISED INJUNCTIVE ORDERS, THE SERVICE IN AUGUST, 1981 REVOKED THE EXEMPT STATUS OF FIVE ORGANIZATIONS OPERATING PRIVATE SCHOOLS IN MISSISSIPPI. THESE ORGANIZATIONS ARE CURRENTLY CHALLENGING THE REVOCATIONS BEFORE THE U.S. TAX COURT.

SOME MISSISSIPPI CHURCHES REFUSED TO PROVIDE THE SERVICE WITH INFORMATION ABOUT SCHOOLS OPERATED BY THEM, AND AT OUR URGING THE JUSTICE DEPARTMENT REQUESTED AND WAS GRANTED A STAY OF THE 1980 INJUNCTIVE ORDERS IN GREEN, PENDING RESOLUTION BY THE COURT OF LEGAL OBJECTIONS RAISED BY AN INTERVENING CHURCH.

JUST PRIOR TO MY BECOMING COMMISSIONER, THE COURTS OF APPEALS HAD SUSTAINED IRS REVOCATIONS OF TAX EXEMPT STATUS IN THE CASES OF BOB JONES UNIVERSITY, GOLDSBORO CHRISTIAN SCHOOLS, AND PRINCE EDWARD EDUCATIONAL FOUNDATION BASED UPON THE RACIALLY DISCRIMINATORY POLICIES OF THOSE INSTITUTIONS.[20] IT SHOULD BE NOTED THAT THE COURT OF APPEALS DECISIONS IN THE BOB JONES AND GOLDSBORO CASES WERE NOT UNANIMOUS, AND THAT IN BOB JONES IN PARTICULAR THERE WAS A STRONG DISSENT BASED ON THE VERY CONCERNS THAT LED TO THE ADMINISTRATION ACTION. WHEN I BECAME COMMISSIONER, THE SERVICE WAS FACED WITH THE DILEMMA OF COMPLYING WITH BOTH THE DORNAN AND ASHBROOK RIDERS AND THE GREEN INJUNCTION. THESE CONGRESSIONAL

20 BOB JONES UNIVERSITY V. UNITED STATES, 468 F. SUPP. 890 (D.S.C. 1978), REVD. 639 F. 2D 147 (4TH CIR. 1980); GOLDSBORO CHRISTIAN SCHOOLS, INC. V. UNITED STATES, 436 F. SUPP. 1314 (E.D.N.C. 1977), AFFD. BY UNPUBLISHED ORDER; PRINCE EDWARD SCHOOL FOUNDATION V. UNITED STATES, 478 F. SUPP. 107 (D.D.C. 1979), AFFD. BY UNPUBLISHED ORDER NO. 79-1622 (D.C. CIR. JUNE 30, 1980), CERT. DENIED, 750 U.S. 944 (1981).

RESTRICTIONS HAVE PREVENTED US FROM DEVELOPING REASONABLE RULES RESPONSIVE TO CRITICISMS FROM CONGRESS AND THE PUBLIC WITH REGARD TO THE STANDARDS AND CRITERIA WHICH SHOULD BE FOLLOWED IN DETERMINING WHETHER A SCHOOL IN FACT HAS A RACIALLY DISCRIMINATORY POLICY.

AS A TAX ADMINISTRATOR, I FOUND MYSELF IN THE UNCOMFORTABLE POSITION OF BEING ORDERED BY A COURT TO APPLY ONE SET OF RULES TO MISSISSIPPI SCHOOLS WHILE AT THE SAME TIME, I WAS BEING PREVENTED BY CONGRESS FROM DEVELOPING UNIFORM RULES TO APPLY ELSEWHERE. THIS SITUATION WAS FURTHER AGGRAVATED BY THE PASSAGE OF THE CONTINUING BUDGET RESOLUTION FOR FISCAL YEAR 1982 WHICH CONTAINS A REVISED ASHBROOK AMENDMENT PROHIBITING US FROM COMPLYING WITH COURT ORDERS. AS A RESULT OF THIS LATEST CHANGE, SECRETARY REGAN ON OCTOBER 1, 1981, WROTE TO ATTORNEY GENERAL SMITH FOR A FORMAL OPINION CONCERNING THE LEGALITY OF OUR CONTINUED COMPLIANCE WITH THE GREEN INJUNCTIVE ORDERS.

AS PART OF MY EVALUATION OF HOW THE SERVICE OUGHT TO HANDLE GREEN AND OTHER PRIVATE SCHOOL LITIGATION, I CONCLUDED THAT IMPORTANT CONSTITUTIONAL ISSUES WERE BEING RAISED, PARTICULARLY BY THE CHURCH-RELATED SCHOOLS, AND THAT THEY SHOULD HAVE AN OPPORTUNITY TO HAVE THEIR CLAIMS ADJUDICATED BY THE COURTS. WE CONVEYED OUR VIEWS TO THE DEPARTMENT OF JUSTICE, AND, IN FACT, THE COURT ULTIMATELY ALLOWED INTERVENTION BY A CLASS OF

CHURCH-RELATED SCHOOLS IN GREEN. SIMILARLY, I FELT THAT THE ROB JONES AND GOLDSBORO CASES RAISED SIGNIFICANT CONSTITUTIONAL QUESTIONS WHICH NEEDED TO BE DECIDED BY THE COURTS, AND WE PREVAILED UPON THE SOLICITOR GENERAL'S OFFICE TO ACQUIESCE IN ROB JONES' PETITIONS FOR CERTIORARI, EVEN THOUGH A MAJORITY OF THE APPEALS COURT HAD SUSTAINED THE SERVICE POSITIONS.

THE LEGISLATION PROPOSED BY THIS ADMINISTRATION TO ADDRESS THE ISSUE WE ARE DISCUSSING WILL PROVIDE A NATIONAL STANDARD FOR THE DENIAL OF TAX EXEMPTION TO RACIALLY DISCRIMINATORY SCHOOLS. IT IS NOT INTENDED TO AND DOES NOT RESOLVE THE DIFFICULT DEFINITIONAL PROBLEMS INHERENT IN THIS AREA OF THE CODE, SUCH AS DEFINING BROAD GENERAL TERMS SUCH AS "CHARITABLE" AND "EDUCATIONAL."

BEFORE CLOSING, I WAS ALSO ASKED TO COMMENT ON THE PLANS OF THE IRS WITH REGARD TO EXISTING REVENUE RULINGS AND PROCEDURES DEALING WITH RACIAL DISCRIMINATION AND SCHOOLS. CONSISTENT WITH THE GOVERNMENT'S FILING IN THE SUPREME COURT AND MY INSTRUCTIONS FROM THE TREASURY DEPARTMENT, IT IS MY INTENTION TO REVOKE THOSE REVENUE RULINGS AND PROCEDURES AND IT IS OUR INTENTION TO RESTORE TAX EXEMPT STATUS TO THE ROB JONES AND GOLDSBORO INSTITUTIONS PENDING ENACTMENT OF THE ADMINISTRATION'S PROPOSED LEGISLATION.

FINALLY, I WANT TO EMPHASIZE THAT THE ROLE OF THE SERVICE IS AND HAS ONLY BEEN TO ADMINISTER THE EXISTING TAX LAWS. WE LOOK TO THE STATUTES, THEIR LEGISLATIVE HISTORIES, AND THEIR JUDICIAL INTERPRETATION. OUR RESPONSIBILITY IS CONFINED TO ENFORCING AND INTERPRETING WHAT IS IN THE INTERNAL REVENUE CODE.

I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE CONCERNING THE SERVICE'S ADMINISTRATION OF THIS AREA SINCE I TOOK OVER DIRECTION OF THE INTERNAL REVENUE SERVICE.

STATEMENT OF HON. ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, WASHINGTON, D.C.

Commissioner EGGER. I have a very brief statement which is sort of an overview of a larger aspect of the problem that I would like to present, and then we can go ahead with the questions.

In my prepared statement I have discussed in some detail the Service's past handling of the schools problem. And although that history is very important, it is also important that the problem be examined in the context of the Service's overall administration of the exempt organizations area. Thus, I would like to comment briefly on the history of tax law relating to exempt organizations so that the fundamental tax administration dilemma which is now highlighted by the private schools issue may be evaluated.

Section 501(c)(3) of the Internal Revenue Code provides for the exemption of organizations organized and operated exclusively for religious, charitable, or educational purposes. This language, as you have been told, had its origin in the tax law in the Tariff Act of 1894 and has remained pretty largely unchanged since that time. Until the 1950's, the Service interpreted this language quite literally in deciding whether an organization was entitled to an exemption. In particular, in the case of charitable organizations, in order to qualify as "charitable," an organization had to demonstrate that it provided aid to the poor and distressed.

An entirely different approach was taken in the estate tax area, that is, with respect to the charitable deduction for estate tax purposes. There, the term charitable was interpreted broadly to include organizations generally beneficial to the community. It is now difficult to understand how such different views of almost identical statutory language remained unresolved for so many years.

By the 1950's, the Service's narrow interpretation of the term charitable in the income tax area had become very difficult to defend. In a 1953 case, for example, the Tax Court rejected this interpretation and held that an organization operating a public beach qualified for charitable exemption. During this period the Service also was faced with an increasing number of organizations that were formed to deal with a wide variety of social, economic, and governmental issues. The problem, of course, was that most of those organizations, although seemingly quite beneficial to society, did not fit within any category of the statute.

The first steps toward the Service's current interpretation of section 501(c)(3) were taken in 1959, largely as a consequence of this dilemma. In effect, the Service adopted in the income tax area the interpretation that it had long followed in the estate tax area. This change was made by adopting the regulations as they exist today. These regulations make it clear that the term charitable is used in section 501(c)(3) in its generally accepted legal sense. Thus, charity is far more than the relief of poverty and includes, in addition to some of the other purposes specifically identified in the statute, many others that have been recognized by the courts as legally charitable.

The change in the regulations in 1959 had little if anything to do with the schools area. In fact, there were probably few, if any, in

the IRS and Treasury that had any idea that the newly adopted interpretation of section 501(c)(3) would have any real bearing on the exemption of schools. What was foreseen was that the new interpretation recognized that there was a basis for the exemption of many types of charities not literally described in the statute. Thus, for example, under the 1959 regulations exemption was generally made available to hospitals, old age homes, and environmental organizations, among others.

In retrospect, it might have been better if the Service and Treasury had at that time referred the issue to Congress instead of developing a solution by changing its regulations. Many problems would have been avoided had the Service obtained from Congress a precise statement with respect to the types of organizations to be exempted and a clear statement of the standards to be observed in applying the exemption rules. At the time, however, changing regulations undoubtedly appeared to offer a solution to the problem. These amendments brought administration in the income tax area in line with that in the estate tax area and provided a framework for answering the many difficult questions facing the Service. Moreover, the regulations and subsequent rulings were widely accepted as a pragmatic way for the Service to proceed in the exemption area. In other words, a reasonable way was found to adopt a legal theory upon which to base many decisions which were for the most part universally accepted as desirable.

It was not until the 1960's, when the Service first faced the problem of segregated schools, that there was any significant criticism of its broadened interpretation of section 501(c)(3). To deal with this problem it became necessary to read the Code section as applying the charitable concept to other exempt purposes specifically set forth in the statute. These were hard cases, the first in which the application of the principles of charity law proved restrictive rather than liberalizing.

The dilemma facing the Service was exacerbated significantly in 1978, when the Service announced substantially revised proposed procedures. There was a huge outcry, and many were strongly opposed to the procedures. Probably no other event has had such a material effect on this whole problem as these proposed rules which were perceived as an unauthorized, aggressive, "guilty until proven innocent" intrusion by the Service in this area.

At this point Congress passed the Dornan-Ashbrook appropriations riders. These riders made it clear that the Service could not implement its proposed procedures, but did not resolve the question of how the exemption statute should be interpreted. The many difficult issues were left to the courts to resolve.

When I said at the beginning of these remarks that I wanted to put the schools problem in context, I meant that it should be seen not as an isolated issue but as part of the continuing evolution of the exemption area. Most of the current, nontechnical views on the schools problems are not the result of informed opinions on how the exemption statute should be construed but the result of strongly held social and moral convictions. The fact remains, however, that for the IRS the authority to proceed depended on proper interpretation of the statute. It is the statute that the IRS must look to in determining what, if any, role it has in resolving this problem.

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I would summarize my feelings as follows. We have had the same exemption statute for over 80 years with relatively little guidance from Congress on how it should be applied. On the basis of this statute and the historical interpretation, we have exempted as charitable some 300,000 organizations of a great variety. Many of these could not have been so identified on the basis of the narrow interpretation of the statute which was in place prior to 1959. We have encountered many interpretative difficulties and we are certain to encounter more in the future. There will be new types of organizations serving the evolving needs of our society but for which there is no precedent in the exemption area. Similarly, there will be groups with purposes totally repugnant to law and public policy seeking haven in the exemption statute. The Service's dilemma neither began with nor will it end with segregated schools.

The problem has, however, called into serious question the Service's legal authority for expanding the interpretation of the Code in the fashion I have described not only in the area of race discrimination in educational institutions but in other potential problem areas. This administration, following a searching review of the legal basis for Service action, concluded that the Service is without authority to interpret section 501(c)(3) to deny exemption to private schools on the basis of racial discrimination. Accordingly, it has sought to deal immediately and directly with this particular issue through its proposed legislative enactment. We welcome explicit congressional guidance and sanction in this area. We all recognize that this is not a total solution to the entire problem, but it does deal immediately with a problem which has severe and grave consequences.

Mr. Chairman, that is the end of this opening statement. I will be happy to answer questions, along with Mr. Gideon here.

The CHAIRMAN. Thank you, Mr. Egger. I think there may be some questions. We appreciate very much your statement. The longer statement will also be made a part of the record. I have had a chance to review that, and it will be very helpful to the committee.

Now, you indicate that you welcome explicit congressional guidance. Do you think it is necessary?

Commissioner EGGER. I believe it is in the context of not only this problem but also the long list of other problems that we see coming down the road, with particular reference to such issues as the first amendment issue in the case of religious organizations as well as guidance in general as to what should be the limits, if any, on our application of such things as national public policy in other areas—how should policy be determined, et cetera.

The CHAIRMAN. If the administration's bill should be enacted, do you believe the IRS regulations will vary from those initiated prior to August 22, 1978? Is there going to be any change if we pass the legislation?

Commissioner EGGER. I think that we are going to have to go back and reexamine those procedures. The 1978 proposals certainly went so far that it seemed pretty clear to us that they were excessive.

Early in my coming into this office I sat down with the Treasury tax policy people and we reviewed the situation and agreed that

there was a real need to reexamine those procedures since they did seem to be excessive. By the same token, that has not yet been reduced to writing, primarily because the appropriation riders have kept us from taking any action on them anyway.

The CHAIRMAN. Do you plan to revoke some or all of the IRS rulings concerning denial of tax-exempt status to private schools which practice racial discrimination?

Commissioner EGGER. Are you talking about our published rulings?

The CHAIRMAN. Yes.

Commissioner EGGER. Yes. We have told the Supreme Court that those rulings would be revoked as a part of the process in restoring exemptions to the *Bob Jones* and *Goldsboro* cases. Just when those will be revoked we haven't decided, but that will be forthcoming.

To begin with, the plaintiffs in the *Green* case have asked the Court to issue an injunctive order to preclude that action, and we have informed counsel for those plaintiffs that we will not move until the Court has had a chance to hear arguments on both sides.

Senator MOYNIHAN. Mr. Chairman, did I hear Commissioner Egger say that he is planning to revoke the denials of tax-exempt status that are in effect?

The CHAIRMAN. That was my question. Is it going to be limited to *Jones* and *Goldsboro*? Or is it going to be across the board?

Commissioner EGGER. Oh, I'm sorry. I think I misunderstood.

Senator MOYNIHAN. I think you did, sir.

Commissioner EGGER. Let me talk first about the *Bob Jones* and *Goldsboro* cases. In those two cases we are in the process of restoring those exemptions, pursuant to the commitment to the Supreme Court.

With respect to the published rulings that set forth the position of the IRS, the commitment to the Court also includes the revocation of those published rulings; however, the timing there, because the plaintiffs in the *Green* litigation have asked the Court to issue an injunctive order precluding that particular action, we have agreed that we will not do that until the Court has an opportunity to hear on both sides of that. And I understand that will take place sometime in the next week or so.

So I wanted to distinguish our action as far as the two schools are concerned and the published rulings.

The CHAIRMAN. What is the dollar amount we are talking about in the *Goldsboro* and *Jones* cases?

Commissioner EGGER. I don't believe the dollar amount of refund is of any considerable amount, because each of the schools, I believe, paid small amounts and sued on refund claims of those. There might be significant dollar amounts of tax to be assessed, were the decisions to go the other way.

Ken, do you have any other statement on this?

Mr. GIDEON. Yes. In both cases there are relatively small refunds involved, although there are significant counterclaims made by the Government for the amount of tax that would be due if they were determined not to be tax exempt.

The CHAIRMAN. Those counterclaims will be gone, right?

Mr. GIDEON. They will be gone, yes.

The CHAIRMAN. Do you have any information of what amount the counterclaims are?

Mr. GIDEON. Senator, I cannot give you exact amounts. I believe that the counterclaim in the *Bob Jones* case is for, roughly, $480,000, and in the *Goldsboro* case it is for roughly $200,000 at this point in time. We can supply exact figures on that.

[The information follows:]

The amounts of the claim and counterclaims involved in the *Bob Jones* and *Goldsboro* cases before the Supreme Court are as follows:

Bob Jones University v. *United States:*	
Claim for refund of Federal unemployment taxes for 1 quarter of 1975	$21.00
Government counterclaim for Federal unemployment taxes for 1971–75	489,675.59
Goldsboro Christian Schools, Inc. v. *United States:*	
Claim for refund of FICA and Federal unemployment taxes for 1970–72	3,459.93
Government counterclaim for FICA, income tax withheld and Federal unemployment taxes for 1969–72	116,190.99

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. I have no questions, Mr. Chairman. I want to thank Mr. Egger for his testimony.

The CHAIRMAN. Senator Danforth.

Senator DANFORTH. Mr. Egger, I guess the opponents of the proposed legislation would take the position that they are against segregation in schools, whether private or public, and that they were quite content with the way the law was being interpreted and applied by the IRS prior to January 8, 1982, and that they don't want that changed.

Now, I would like you to compare the provisions of S. 2024 with the law as it existed prior to January 8, 1982, and to tell me whether S. 2024 would be looser or tighter or about the same in its application as the prior law. Does S. 2024 offer any loopholes to discriminating schools which were not available in prior times?

Commissioner EGGER. All right. Let me lay just a couple of ground rules on that. First, we are talking only about private schools rather than other types of institutions.

Senator DANFORTH. That is all that S. 2024 applies to, I think.

Commissioner EGGER. Yes.

And also leave aside for the moment the proposed rulings and procedures which were issued in 1978 and 1979 but which have been the subject of prohibiting riders since then.

Senator DANFORTH. Right.

Commissioner EGGER. We do not believe that the proposed legislation would change in any material respects the positions that we took with respect to private schools prior to January 8, except those in Mississippi where we were subject to specific injunctive order rules under the district court's ruling here.

Senator DANFORTH. So with respect to Mississippi, if we were to pass this bill, what would be the difference?

Commissioner EGGER. I guess I will have to ask my attorney to answer that one, because that involves the question of what happens in the *Green* litigation.

Mr. GIDEON. I think the Court was trying to interpret the law as it found it at that point in time, and we would certainly request

the Court to bring the Mississippi standards into conformity with those on which the Congress has acted.

Senator DANFORTH. So, if we pass this bill, with respect to the State of Mississippi the law would be stricter with respect to racial discrimination than it is right now or than it was prior to January 8?

Commissioner EGGER. I think to the contrary. I think in the State of Mississippi the standards that are spelled out here and the procedures that we would follow would be not quite as restrictive as perhaps under the Court's order.

Senator DANFORTH. All right.

Now, I asked a question of the previous panel whether or not the last part of section (2)(i), where racially discriminatory policy is defined, amounts to a loophole. Would it be any more or less of a loophole than was the case before January 8?

Commissioner EGGER. No; we think under our published Revenue Ruling 71-447, and Revenue Procedure 75-50 that, unless there was a clear intent, that the mere fact that the members of the church or whatever happened to be of one race versus more than one race, we would not regard that as discriminatory. In other words, if the church doors were in fact open to members of all races.

Senator DANFORTH. Whether or not people happened to come in of a variety of races?

Commissioner EGGER. That is correct.

Senator DANFORTH. And therefore it is your view that this provision of the bill restates the past policies of the IRS rather than creates a new loophole?

Commissioner EGGER. It is intended to work essentially the same way; yes, sir.

Senator DANFORTH. Thank you.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Does the IRS confine itself to a religious school's enrollment and admissions policies, or does it get into examining the underlying beliefs of a religion in this whole process of ascertaining whether or not a religious school has racially discriminated?

Commissioner EGGER. We don't examine into the religious beliefs, and it wouldn't come into focus other than in case someone attempted to defend a discriminatory practice on the basis of a religious belief, in which case the outcome would be the same as it is in the *Bob Jones* or the *Goldsboro* cases.

Senator GRASSLEY. Well, is there a very clear dividing line between underlying religious beliefs and that school's enrollment and admissions policies, as far as the practical standpoint of your administering the law?

Commissioner EGGER. I am not sure I follow the question.

Senator GRASSLEY. I took your answer to my first question to be, basically, that you would never get into the church's religious beliefs as opposed to the school's enrollment and admissions policies unless somebody used that as an excuse.

Commissioner EGGER. Yes.

Senator GRASSLEY. Then my followup question is: As a matter of practice, and I guess I would limit my question to as a matter of practice, has there been a clear dividing line?

Commissioner EGGER. Yes.

Senator GRASSLEY. There has been?

Commissioner EGGER. Yes; I am satisfied in all the cases I know about.

Senator GRASSLEY. I hope you appreciate the reason that some of us are pursuing these questions, because of the fear of what this legislation might do, getting beyond just the school itself into what the religious beliefs of the particular church might be has serious constitutional implications. I think it is legitimate that you investigate cases where religion is used as an excuse for racial discrimination; but who knows what subterfuge the future might hold for using this legislation as a vehicle for examinimg religious tenets when that isn't used as an excuse, as well.

Commissioner EGGER. Well, Senator Grassley, I don't know of any reason why we would ever need to inquire into religious beliefs or practices or tenets aside from inquiring into the question of discriminatory practices with respect to the educational side of it. There is no prohibition on what someone believes. It is only a question of whether, when they put that into practice and the effect of it is to preclude participation by someone on account of race, then we say that that is grounds for not granting the exemption.

Senator GRASSLEY. Should this be clearly stated in the legislation to avoid any confusion in this area?

Commissioner EGGER. I don't really believe that has been a problem. I know that here have been a lot of claims that we are about to do that and that we have been harassing churches, and so on. But quite frankly, all of the cases that I have gone into where those claims have been made, I have found them either misrepresentations, or I have found that they involved tax protestors who were using that as a smokescreen, frankly, to cover up their own schemes.

Senator GRASSLEY. Then in that particular instance that would be unrelated to any school?

Commissioner EGGER. Absolutely.

Senator GRASSLEY. What do you think of referring questionable schools to the Department of Justice for the determination of racial discrimination?

Commissioner EGGER. I don't have any particular wish to see the agency that I head have to make these hard decisions. But, quite frankly, the orderly administration of the tax laws would make it very, very difficult if each time a difficult judgment has to be made we would refer it to another agency of the Government. I am not satisfied, necessarily, that the Department of Justice or any other department is better equipped to make what amounts to a judgment call than the Internal Revenue is. We have to make it with respect to almost every section of the code. For example, in order to qualify films for investment tax credits they have to be educational. So we have to decide what an educational film is there, and so on.

Senator GRASSLEY. How do you monitor whether or not a school is engaged in racially discriminatory practices? And how often are your determinations reviewed?

Commissioner EGGER. Well, we have in being now Revenue Procedure 75-50 which sets forth the things that the schools themselves should do to demonstrate a nondiscriminatory policy. And since the early 1970's we have attempted to examine between 5 and 10 percent of the schools, that is, the private schools, each year as a kind of audit program. It doesn't necessarily mean that any one school would be audited only every 20 years; it depends on how information comes to us. Sometimes people complain, sometimes other information comes to our attention, and so on.

Senator GRASSLEY. How many schools are currently denied tax-exempt status?

Commissioner EGGER. I am not sure I can answer that.

Senator GRASSLEY. I presume my question would have to be based on those that would make application and that they have been denied. But it still may not be possible for you to answer.

Commissioner EGGER. Right. In the 1970-71 period we denied exemption on about 115 schools that were deemed to be discriminatory in their practices. Since that time we have only denied the exemptions of about two or three for that reason, except for the five in Mississippi where we withdrew their exemptions pursuant to the injunction order in the *Green* case. And all of them, by the way, have come back to the Tax Court asking for a declaratory judgment in the Tax Court.

Senator GRASSLEY. Did a large share of those first 115 take corrective action?

Commissioner EGGER. Some of them did, but I cannot tell you the number. I don't think anything like a majority of them did. Many of them went out of business.

Senator GRASSLEY. Mr. Chairman.

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. Thank you.

Mr. Egger, I wonder if, in response to Senator Grassley's excellent question, you couldn't find someone to give us a chronological account of the 1970 decision and also some evidence, if you have it, of what did happen to those schools. I think that most of them just disappeared.

Commissioner EGGER. To some extent we can do that. I am not sure I have statistics that are up to date, but we will give you what we can. Yes, sir.

[The information follows:]

Our research indicates that the tax exemptions of 111 schools were revoked by the IRS. Nine (9) of these 111 schools subsequently reestablished exemption after revocation and an additional 21 are no longer in existence. Of the 102 schools currently listed as being no longer exempt, 81 appear to be still in existence. However, our information indicates that thirteen (13) of these 81 schools may no longer be separate entities, but rather operating as a part of another organization, such as a church.

The following is a chronological account of the Internal Revenue Service's involvement in the area of tax-exempt status for private schools, including the *Green* case:

1954—*Brown* v. *Board of Education* 347 U.S. 483 Supreme Court rules public school cannot discriminate on basis of race.

1954-64—Service grants exemption to private schools without regard to their racial policies.

1964—Congress passes Civil Rights Act of 1964 that precludes any program or activity from receiving Federal financial assistance if persons are excluded from participation based on race.

1964—Court strikes down state aid to private schools that racially discriminate. *Lee* v. *Macon County Board of Educators; Griffin* v. *Board of Supervisors of Prince Edward County; United States* v. *State of Mississippi.*

1965—Service suspends ruling on private schools during study of effect of racial discrimination on their tax-exempt status.

August 2, 1967—Service resumed ruling on tax exempt status of racially discriminatory private schools. Schools denied exemption if state aid violates the Constitution.

May 21, 1969—Parents of black Mississippi public school students bring action against the Secretary of Treasury to enjoin Service from granting exemption or continuing exemption of racially discriminatory private schools in Mississippi.

January 12, 1970—D.C. District Court issues order of preliminary injunction against Service *Green* v. *Kennedy* 309 F. Supp. 1127.

January 13, 1970—Service issues news release responding to comments of Secretary Finch of HEW that Treasury should eliminate tax-exempt status of racially discriminatory schools. IRS said tax-exempt status of private schools is based on law and not subject to Commissioner's discretion.

January 21, 1970—*Green* Court permits Dan Coit to intervene on behalf of white parents supporting schools with exclusive white enrollment.

June 26, 1970—*Green* Court enters supplemental order requiring Service to suspend advance assurance of deductibility of contributions to a school operated for racially segregated basis.

July 10, 1970—Service issues a news release announcing that it could no longer legally justify allowing tax-exempt status to private schools that racially discriminate.

July 10, 1970—White House issues a press release that President approves and concurs in IRS decision regarding private schools. Indicates that tax status of racially discriminatory schools will be determined by courts.

July 19, 1970—Service announces that July 10 policy statement applies to all schools in the nation except as limited by Green order. This policy applies to all private schools whether church-related or not.

August 12, 1970—Commissioner Thrower testifies to explain Administration position on Private School position before the Senate Select Committee on Equal Education.

August 27, 1970—*Green* Court considers Coit's motion to setaside order.

September 14, 1970—*Green* Court denies Coit motion and Coit appeals to Supreme Court.

November 1970—Service initiates a nationwide survey of all private schools.

January 11, 1971—Supreme Court dismisses Coit's appeal for want of jurisdiction 400 U.S. 986.

June 30, 1971—*Green* Court issues permanent injunction preventing Service from approving or continuing tax exemption and contributions deductible to racially discriminatory private schools in Mississippi.

August 4, 1971—Service and Justice officials meet with Secretary Connally. Green requirements will only be applied to Mississippi Schools. Service will publish Rev. Rul. explaining legal basis for Service position.

September 1971—Coit files direct appeal of the *Green* injunction to Supreme Court arguing right of freedom of association. Supreme Court affirms precurium the District Court Decree, 404 U.S. 907.

October 4, 1971—Service publishes Rev. Rul. 71-447 explaining basis for denial of exemption of racially discriminatory schools.

December 17, 1971—District Court enjoins Service from revoking exemption and denying contribution deductions to *Bob Jones University.*

December 17, 1972—Deputy Assistant Attorney General for the Tax Division of the Department of Justice advises IRS Chief Counsel that in his opinion the Supreme Court by affirming the *Green* Court order has adopted the lower courts interpretation of Section 501(c)(3).

1972—Service published Rev. Proc. 72-54 establishing guidelines for publication of racially nondiscriminatory policy and showing bona fide operation.

1972—*McGlotten* v. *Connally,* 338 F. Supp. 448 District Court applied Title IV of the Civil Rights Act to fraternal organizations but not tax-exempt social clubs.

1972—Court holds that *Bob Jones University* is not entitled to educational benefits for veterans from the government because the school racially discriminates 396 F. Supp. 605.

January 19, 1973—Court of Appeals reverses District Court injunction of December 17, 1971 ordering the Service to refrain from revoking the tax-exempt status or the deductibility of contributions to *Bob Jones University*.

1973—U.S. Supreme Court strikes down Mississippi law that permits state aid for text books or transportation to students attending racially discriminatory schools in Mississippi. Case remanded to District Court to establish a certification process to determine which schools were discriminatory, *Norwood* v. *Harrison* 413 U.S. 455.

1974—District Court in Mississippi establishes certification and standards for a prima facie case of discrimination for private schools in Mississippi, *Norwood* v. *Harrison* 382 F. Supp. 924.

1974—*Bob Jones* v. *Johnson*—Circuit Court sustained Veterans Administration's termination of benefits to veterans attending Bob Jones University.

1974—U.S. Supreme Court holds that *Bob Jones University* suit to enjoin IRS from finally revoking exemption is barred by Anti-Injunction Act and the Declaratory Judgment Act. Court suggests to University that it seek the refund suit route, 416 U.S. 725.

1974—U.S. Commission on Civil Rights issues critical report of Service administration of private schools that are racially discriminatory.

November 14, 1974—Service established task force to study U.S. Commission on Civil Rights Report recommendations and prepares necessary actions.

February 14, 1975—Service publishes for public comment a proposed Revenue Procedure establishing guidelines and recordkeeping requirements for private schools.

May 22, 1975—Service publishes TIR and Rev. Rul. 75-231 holding that church schools and organizations operating schools that are racially discriminatory are not tax exempt under 501(c)(3). Shortly thereafter Commissioner Alexander announces we would apply a diminimus rule in administering Rev. Rul.

December 8, 1975—Service publishes Rev. Proc. 75-50 following comments received on proposed procedures.

1976—*Runyon* v. *McCrary* 427 U.S. 160, U.S. Supreme Court rules that Section 1981 of the 1866 Civil Rights Act prohibits private nonsectarian school from denying admission to blacks.

January 1976—IRS issues final letter of revocation of tax-exempt status to *Bob Jones University* effective 12/1/70.

1976—*Brumfield and United States* v. *Dodd*—Louisiana District Court enjoins state from providing test books and transportation for private racially discriminatory private schools using standard adopted by the *Norwood* Court.

July 23, 1976—*Green* v. *Blumenthal*—Motion filed to enforce permanent injunction and request further declaratory relief.

July 30, 1976—*Wright* v. *Blumenthal*—Companion suit to Green filed by parents of children attending public schools outside of Mississippi.

October 20, 1976—Congress amends section 501 of the Code to deny tax exemption to social clubs whose charters contain restrictions for membership based on race, color or religion. Congress adds provision so that social clubs would have same anti-discrimination rule found not applicable in *McGlotten* decision. Senate report cited *Green* case.

1977—*Brown* v. *Dade Christian Schools, Inc.* 556 F. 2d 310 (5th Cir.) Cert. denied 434 U.S. 1063—Section 1981 of the 1866 Civil Rights Act applies to a private sectarian school that has a policy of nonintegration. The Service also revoked the tax-exempt status of this organization.

1977—*Goldsboro Christian School*—District Court holds private religious school is not entitled to tax exemption notwithstanding religious belief on which its racially discriminatory policy is based.

August 22, 1978—Service publishes in Federal Register for public comment a Proposed Revenue Procedure providing guidelines used in reviewing a school's racial policy.

December 5-8, 1978—Service conducts public hearings on Proposed Revenue Procedure.

December 26, 1978—*Bob Jones University* v. *U.S.* District Court holds Service improperly revoked tax-exempt status of religious institution practicing racial discrimination.

February 9, 1979—IRS revised Proposed Revenue Procedure and publishes in Federal Register for public comment.

February 20 and March 23, 1979—Commissioner Kurtz testifies before the Subcommittee on Oversight of the Committee on Ways and Means, re: Proposed Revenue Procedure.

April 27, 1979—Commissioner testifies before Senate Subcommittee on Taxation and Debt Management of the Finance Committee, re: Proposed Revenue Procedure.

1979—Commissioner testifies before Senate Finance Committee in view of proposed appropriations restrictions on publication of Proposed Revenue Procedure.

April 18, 1979—*Prince Edward School Foundation* v. *Commissioner* District Court relying on *Green* holds that private school has not established that its admissions policy was not racially nondiscriminatory.

August 31, 1979—Staff Report of the Subcommittee on Oversight of House Ways and Means generally supports Service position on Proposed Revenue Procedure. Indicates with certain changes it would be in conformity with established legal principles.

September 29, 1979—Appropriations Riders preclude IRS from adopting or formulating new procedures on private schools.

1979—*Wright* v. *Blumenthal*—District Court dismisses suit based on standing.

May 5, 1980—*Green* Court issues supplemented and modified permanent injunction.

June 2, 1980—Service sought in *Green* clarification of several provisions of the modified injunction and it was further clarified.

June 30, 1980—*Prince Edward School Foundation* v. *United States* affd per curium by unpublished order No. 79-1622.

July 1980—Service initiates survey of Mississippi private schools for compliance with *Green* order.

1980—Fiedler v. *Marumsco Christian School* Court holds that sectarian religious school that has rules similar to Bob Jones violates section 1881 of Civil Rights Act of 1866 citing holding in *Runyon*.

July 5, 1980—Congress passes supplemental appropriation with restrictive rules.

August 19, 20, 1980—Congress passes general appropriations prohibition against IRS from implementing any new rules through Fall of 1981.

October 1, 1980—Congress passes Continuing Resolution on appropriation with restrictions.

December 15, 1980—Congress passes Continuing Resolution on appropration with restrictions.

December 30, 1980—*Bob Jones University*, Court of Appeals reverses District Court and holds that Service based on *Green* decision had authority to revoke University's exemption.

January 3, 1981—*Goldsboro Christian Schools*—Court of Appeals affirms District Court's decision that school is not entitled to exemption.

1981—*Prince Edward School Foundation* v. *United States*—The Supreme Court denied cert. on schools appeal of the D.C. Circuit Court decision 750 U.S. 944 (1981).

June 18, 1981—*Wright* v. *Regan*—The D.C. Circuit Court of Appeals reversed the D.C. District Court and granted plaintiffs right to standing and remanded the case back to the District Court for decision, 665 F.2nd 820 (D.C. Cir. 1981).

August 20, 1981—*Wright* v. *Regan*—Circuit Court of Appeals denies Government Request for rehearing.

November 23, 1981—*Wright* v. *Regan*—Government petitions Supreme Court for Certiorari.

July 1, 1981—Bob Jones University files petition for certiorari to the Supreme Court.

July 2, 1981—Goldsboro Christian Schools files petition for certiorari with Supreme Court.

July 15, 1981—*Green* v. *Regan*—The District Court permitted Clarkdale Baptist Church to intervene.

October 13, 1981—Supreme Court grants petition for certiorari in *Bob Jones* and *Goldsboro*.

September 1981—Government files briefs acquiesing in request for certiorari.

August 17, 1981—Service revoked the tax-exempt status of five Mississippi private schools.

November 12, 1981—Mississippi private schools whose exempt status was revoked petition the Tax Court for Declaratory Judgment.

January 6, 1982—*Green* v. *Regan*—District Court stays all proceedings until Supreme Court issues decision in *Bob Jones* and *Goldsboro*.

Senator MOYNIHAN. You know, pick up the telephone and call the place and say, "Is there a school down there named," whatever.

Could I ask you one last question? You perhaps don't have to answer it now, but could you tell me what is the situation on the

ground, as you might say? You have a statute up here, a bill that has been introduced by our chairman. There are some alternative views. No bill is necessary. No bill is going to pass, in fact. What are you going to do in the interval here while you are waiting for this bill? I gather you are going to continue to apply the pre-1978 standard, as you might say? If a school starts up and comes in, what will you do? Will you say, "I can't tell you"?

Commissioner EGGER. Well, one of the things is, and then I would like Mr. Gideon to also add to it, we have looked at it and we believe that the situation is so, frankly, confused at the moment with the legislation pending and these hearings onboard and one or two court actions already initiated that the best thing we can do is to sort of maintain calm and status quo. And so I have instructed the field to go ahead and accept these applications, but that they shouldn't be processed until we are able to give them better direction.

Senator MOYNIHAN. Right.

I wonder if I could ask you, sir, if you would give a statement to the committee of what your instructions to the field are.

Commissioner EGGER. Certainly.

Senator MOYNIHAN. Because there would come a time that, if we didn't pass the bill, the applications wouldn't be processed. There would be an effective denial, wouldn't there?

Commissioner EGGER. At this time the only instructions to the field are to not process them.

Senator MOYNIHAN. Let the paper pile up?

Commissioner EGGER. Right. In due course, however, if there is no legislation, given the departmental position, we will have to proceed.

Senator MOYNIHAN. Would you mind just trying to give me a statement about what your instructions to the field are so we will have some sense of what we are dealing with?

Commissioner EGGER. Certainly.

[The statement follows:]

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INTERNAL REVENUE SERVICE

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ALL REGIONAL INSPECTORS

ON FRIDAY, JANUARY 8, 1982, THE DEPARTMENT OF THE TREASURY ANNOUNCED THAT WITHOUT FURTHER GUIDANCE FROM CONGRESS, THE INTERNAL REVENUE SERVICE WILL NO LONGER REVOKE OR DENY TAX EXEMPT STATUS FOR RELIGIOUS, CHARITABLE, EDUCATIONAL, OR SCIENTIFIC ORGANIZATIONS ON THE GROUNDS THAT THEY DO NOT CONFORM WITH CERTAIN FUNDAMENTAL PUBLIC POLICIES, SUCH AS FORBIDDING DISCRIMINATION ON THE BASIS OF RACE.

THE FIELD WILL IMMEDIATELY SUSPEND ANY DETERMINATION OR EXAMINATION CASE WITH RESPECT TO THE ABOVE ISSUE UNTIL FURTHER NOTICE.

S. ALLEN WINBORNE
ASSISTANT COMMISSIONER
(EMPLOYEE PLANS AND EXEMPT ORGANIZATIONS)

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U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 2595 (2-59)

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FURTHER NOTICE.

S. ALLEN WINBORNE
ASSISTANT COMMISSIONER
(EMPLOYEE PLANS AND EXEMPT
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U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 2595 (3-57)

Senator MOYNIHAN. And may I make one other statement? These hearings this morning have not confused anything. I think they have been very good hearings. And I want to thank everyone, including yourself, Mr. Egger, and Mr. Gideon. I know a lot more about this subject than I did when I came in this morning.

Commissioner EGGER. Thank you.

The CHAIRMAN. Thank you, Senator Moynihan. I appreciate that.

I have a question that Senator Durenberger wanted me to ask: If Congress decides, looking at the administration's bill, that theirs needs more specific legislative guidelines, do you have any recommendations now? Or are you content to wait and find out if we need to provide more guidelines? Do you have any suggestions if you were going to volunteer any additions?

Commissioner EGGER. I believe the bill is adequate to deal with the private school race discrimination issue, but it does not go to the many, many interpretive questions that are inherent in the statute and which will in due course need some kind of clarification. We are undoubtedly going to be working with the Treasury to take a more indepth look at all of these other issues. Much of it is going to depend on what happens in the case of some of these court issues that we will be facing here in the near future.

The CHAIRMAN. Under prior law and under the administration's proposal, what reporting requirements regarding race are imposed on churches and church-related schools claiming tax-exempt status?

Commissioner EGGER. I think you are asking about the returns that they have to file?

The CHAIRMAN. Yes.

Commissioner EGGER. Well, churches as such are not required to file, but the other schools are required to file annual reports. But these are basically financial reports.

The CHAIRMAN. But do the church schools file reports?

Commissioner EGGER. Not necessarily. Some schools that are church affiliated do not file because they come within the church organization as such or are separately incorporated, and so on, do file. The church, or school (if separately incorporated), must file a certification of racial nondiscrimination annually with the service.

The CHAIRMAN. Do you think it would be of any value if the Court would proceed to go ahead and decide the cases, the *Jones* and *Goldsboro* cases? Would that be of any help to you?

Commissioner EGGER. Well, it would certainly be a help if the Court would——

Senator MOYNIHAN. Careful. [Laughter.]

Commissioner EGGER. If the Court would decide the first amendment issue that is inherent in these two cases.

The CHAIRMAN. Do you think, as Mr. McNamar suggested, they might only decide that you didn't have the authority, rather than the big question?

Commissioner EGGER. I think that's a possibility. Yes, indeed.

The CHAIRMAN. I don't know how we can determine what the Court will decide, but we wish they would proceed. Now, we don't have any way to send that message. We thought about calling the Chief Justice as a witness, but I don't think he would appreciate that. [Laughter.]

But it would seem to us it would certainly be helpful. I mean, people on both sides then would know that we have addressed that one area. And if they did in fact say there was no authority, it exceeded your authority, that would pressure the Congress to move. Right now I think we are in the same predicament as others, and I think Senator Moynihan may have correctly stated the fate of this legislation. It is uncertain.

Senator MOYNIHAN. Uncertain. Yes, Mr. Chairman. That is an elegantly oblique observation.

The CHAIRMAN. Is there anything else? Mr. Gideon? Mr. Egger?

Well, if not, we appreciate it very much, and as we dig into this more or dig out of it more, depending on your point of view, we may be talking to you.

[Whereupon, at 2:06 p.m., the hearing was adjourned.]

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